IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 156

GEORGE K. ROSENBERG, DISTRICT DIRECTOR,
Petitioner,

—v.—

YEE CHIEN WOO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX TO APPENDIX

INDEX

Proceedings Below

Chronological List of Important Proceedings and Dates

Date	
March 8, 1966	(1) Application for classification as a refugee filed in district office, Immigration and Nationalization Service, Los Angeles, California
October 24, 1966	(2) Decision and Order of District Director entered.
....., 1966	(3) Affidavit of Applicant in Support of Appeal filed.
April 11, 1967	(4) Decision and Order of Regional Commissioner, Immigration and Naturalization Service, Southwest Region, San Pedro, California entered
May 9, 1967	(5) Complaint filed in U.S. District Court for the Southern District of California
July 19, 1967	(6) Notice of Motion to Dismiss filed
August 4, 1967	(7) Minutes of District Court on hearing on Motion to Dismiss
August 10, 1967	(8) Order on Motion to Dismiss entered
August 28, 1967	(9) Answer filed
Jan. 25, 1968	(10) Notice of Motion for Summary Judgment filed
April 29, 1968	(11) Minutes of District Court on Hearing on Motion for Summary Judgment
November 27, 1968	(12) District Court's Decision and Order entered

Date	
January 27, 1969	(13) Notice of Appeal filed
December 18, 1969	(14) Opinion of U.S. Court of Appeals filed
December 18, 1969	(15) Order directing filing of opinion and filing and recording of Judgment entered
December 18, 1969	(16) Judgment of U.S. Court of Appeals entered

EXHIBIT (A)

Form Approved.
Budget Bureau No. [Illegible]

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

APPLICATION FOR CLASSIFICATION AS A REFUGEE

(Under the proviso to Section 203(a)(7), Immigration and Nationality Act as amended)

File No.
A - 12 - 684 - 382

APPLICANT TO FURNISH THE FOLLOWING INFORMATION
(See Instructions on Reverse)

Type or Print

1. My name is: First YEE Middle CHIEN Last WOO

2. I reside in the United States at:
(Apt. No.) *(No. and Street)* *(City)* *(State)* *(ZIP Code)*
1325 B Coast Blvd. La Jolla, California

3. I was born in: *(City or Town)* *(Province)* *(Country)*
Shanghai China

4. I am:

☒ Male ☐ Single
☒ Married
☐ Female ☐ Divorced
☐ Widowed

5. My Father's name and address is:

6. My Mother's name and address is:

7. My spouse resides at:
(City or Town) *(Province or State)* *(Country)*
1325 B Coast Blvd. La Jolla, California USA

8. Date married: 12/17/53
Place married:

(City or Town) *(Province or State)* *(Country)*
Hong Kong

9. I fled or was displaced from *(Name of Country)* on or about *(month) (day) (year)* for the following reasons *(state in detail)*: I fled from Mainland China in 1953 because the Communist Government of China expropriated my business as distributor for Frieden & Underwood Business Machines and office furniture in Shanghai and Chungking. As the business was worth about $500,000, I was regarded as a capitalist and of doubtful loyalty to the Communists. I feared for my life and therefor fled.

10. I am unwilling or unable to return to the country from which I fled or was displaced because: Reasons: *(State in detail)*. I am unwilling to return to China because I am opposed to the Communists in control of my Country because they have stolen my business. My wife's father also was a businessman with 20 employees, and the Government took away his business, let him work for one year as an employee then fired him, and he became ill and died in 1957. Her brother was imprisoned for two years as a suspicious person and brainwashed during that two years. I hate the Communists and have been outspoken about my dislike of them and the Regime.

11. In the spaces below, list *all* of your entries into and departures from the United States. *(Show your last entry FIRST.)*

ENTRIES		DEPARTURES	
Date	Port	Date	Port
1960, May 22	Seattle, Wash.		
1959	Portland, Ore.	September, 1959	

12. I ☐ have ☒ have not been absent from the United States during the past two years.

/s/ Yee Chien Woo — Mar. 8, 1966
(Signature of Applicant) — *(Date of Signature)*

Signature of person preparing form, if other than applicant:

I declare that this document was prepared by me at the request of applicant and is based on all information of which I have any knowledge.

/s/ Gordon G. Dale

Address of person preparing form, if other than applicant:

131 West Wilshire
Fullerton, California

Occupation: Attorney

DO NOT WRITE BELOW THIS LINE

Interview on:

Date:

At:

Immigration Officer

☐ Approved. Immigrant Visa Number Is Allocated to Applicant Pursuant to the Proviso to Section 203 (a) (7), Immigration and Nationality Act, As Amended.

☐ Disapproved Because

Date — District Director

INSTRUCTIONS

This form must be executed, signed and submitted in one copy with your Application for Status as a Permanent Resident, Form I-485, if you are claiming preference classification as a refugee. A separate form must be submitted for each member of your family who is claiming such classification. The form shall be executed by the parent or guardian of a child under 14 years of age.

1. INTERVIEW—The person who executes this form will be required to appear for an interview before an immigration officer. The interview may be waived in the case of a child under 14 years of age.

2. PENALTIES—Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact or using any false document in the submission of this application.

EXHIBIT (B)

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
LOS ANGELES, CALIFORNIA

Oct. 24, 1966

File: A12 684 382

In re: Yee Chien WOO, also known as Harry WOO

APPLICATION:

For classification as a refugee under the proviso to section 203(a)(7) of the Immigration and Nationality Act, as amended.

IN BEHALF OF APPLICANT:

Gordon G. Dale, Esq.
131 West Wilshire
Fullerton, California 92632

The instant application for classification as a refugee under the proviso to section 203(a)(7) of the Immigration and Nationality Act, as amended, was filed on March 8, 1966. The applicant was interviewed in connection with this application by an officer of the Service at San Diego, California on April 13, 1966 and October 4, 1966. On each of these dates, question and answer statement under oath was taken from the applicant at which time his attorney was present and participated in the interrogation.

The applicant is a fifty-three year old married male, a native and citizen of China by reason of his birth in Shanghai, China. From the date of his birth to 1953, he resided in Shanghai, China except for a five year period commencing in 1941 when he lived in Chungking, China as a result of the Japanese occupation. As a result of his first marriage which terminated by the death of his wife, the applicant has three sons and two daughters presently residing in Shanghai. The applicant owned a typewriter and office equipment business both in Shanghai and Chungking and continued in this enterprise until 1952

when his business and other assets were confiscated by the Chinese Communists who first took over the government in China according to the applicant in 1949. At the time of this confiscation his business grossed an annual sum of $120,000.

The applicant testified that in 1952 he was arrested by the Communists in China and detained by them for fourteen days during which he was interrogated and forced to reveal his financial holdings. He was then released. After his business was confiscated, he was employed by others in Shanghai.

The applicant testified that after three refusals of his applications for permission to leave Shanghai, his fourth request in 1953 was granted after intercession by his then employer for a visit outside of China with the understanding that he would return. He departed in 1953 for Hong Kong and has not since returned to China. At the time of his departure, he states that he took nothing with him in the way of assets or property.

On December 17, 1953 in Hong Kong, he married his present wife, Yow Dai WOO, a native and citizen of China, and of this marriage a son was born to them in Hong Kong on July 2, 1954. Shortly after his arrival in Hong Kong, he started a business of taking orders for merchandise and clothing under the name of Harry Woo Trading Company which business continued until some time in 1965 when his wife and child departed Hong Kong for Canada. The applicant has stated that he is in possession of a valid Hong Kong Certificate of Identity which is sufficient documentation for his return to Hong Kong and permission to reside there. He stated that he did not know whether he would be permitted to reopen his business in Hong Kong were he to return but knew of no reason why he would not be permitted to do so. He states that he has never been persecuted in Hong Kong but is fearful of returning there because it could fall to the Chinese Communists at any time. He stated that he had no property, assets, or relatives in Hong

Kong and that he and his wife occupied an apartment during the period of their residence there.

The applicant stated that he has never engaged in politics and that he belonged to no specific religious faith until 1962 when he joined the Catholic Church. He expressed the fear that he would be persecuted in China as a member of the capitalist class and because he had advised many persons in Hong Kong not to return to China. He states his opposition to Communism.

The applicant was physically present and residing in Hong Kong from 1953 when he departed the mainland of China until 1959 when he was admitted to the United States as a temporary visitor for business with an appropriate visa in order to operate a concession at the World International Fair in Portland, Oregon and later in Chicago, Illinois. Following this temporary admission to the United States, he departed and returned to Hong Kong in September 1959. He remained in Hong Kong with his wife and son until May 22, 1960 when he made his second and final entry into the United States as a nonimmigrant temporary visitor for business in possession of an appropriate visa. His temporary stay in such status expired November 19, 1962 and he has since remained without further permission. His purpose in coming to the United States on this second occasion was to attend the San Diego Fair and the International Trade Mart at which places he sold merchandise imported from his business in Hong Kong. On March 8, 1966, following a hearing in deportation proceedings, an order was entered granting him the privilege of voluntary departure with an alternate order of deportation should he fail to depart voluntarily. The applicant's wife and minor child are also illegally in the United States following their admission as temporary visitors for pleasure from Canada on February 7, 1965. On March 8, 1966, following a hearing in deportation proceedings, an order was entered with respect to the applicant's wife granting her the privilege of voluntary departure with an alternate order of deportation.

Section 203(a)(7) of the Immigration and Nationality Act, as amended, reads as follows:

> "Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201 (a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

The words "to such aliens" contained in the proviso to section 203(a)(7), as amended, limits the benefits of the proviso to those aliens described in (A) or (B) of that section and who, in addition, have the required continuous physical presence in the United States for a period of at least two years. The instant applicant has the burden

of proving, therefore, that he falls within (A) or (B) of the main body of the section and that he has the required minimum period of continuous physical presence in the United States.

In Matter of K—, A12 491 782, Interim Decision 1636 dated September 9, 1966, it was held that only physical presence in the United States which is a consequence of the alien's flight in search of refuge could be considered as qualifying physical presence within the purview of the proviso. The legislative history with respect to the several prior Refugee Relief Acts, the regulations promulgated and administrative interpretations thereunder, and the legislative history which led to the enactment of section 203(a)(7) of the Act of October 3, 1965, fully support that conclusion as to what type of physical presence is qualifying under the proviso.

The evidence of record in support of the instant application clearly establishes that the applicant, following his departure from the Chinese mainland, resided and was physically present in Hong Kong from 1953 to 1960 except for a period of approximately 115 days in 1959 when he was in the United States as a temporary visitor for business operating a concession at the World International Fair in Portland, Oregon for some 100 days and in Chicago, Illinois for some 15 days. He departed the United States in September of 1959 returning to his residence, his family, and his business in Hong Kong. In 1960 he entered the United States ostensibly as a visitor for business to participate in international fairs in this country. He has failed to depart although the period of his admission expired.

A review of the record in a light most favorable to the applicant establishes that his claimed flight from the mainland of China terminated in Hong Kong where he opened a business, married, and fathered a child. He was permitted to enter, reenter, reside, and remain in Hong Kong pursuant to the duly constituted governmental authorities in that colony as evidenced by his being issued and being presently in possession of a valid

unexpired Certificate of Identity with which he has departed and returned to Hong Kong in 1959 and with which he can again reenter and resume his residence in that colony together with his wife and child.

In determining when physical presence in the United States is a consequence of an alien's flight in search of refuge, the physical presence must be one which is reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge. What is reasonably proximate in any given case must be determined on all of the facts and circumstances presented in each individual case. No hard and fast rule applicable to all cases can be enunciated. On the basis of the facts and circumstances presented in support of the instant application, it must be concluded that the applicant's presence in the United States, whether it be computed from his first temporary entry in 1959 or his second on May 22, 1960, was not and is not now a physical presence which was a consequence of his flight in search of refuge from the Chinese mainland.

It having been determined that the applicant has failed to establish the necessary qualifying continuous physical presence in the United States, no determination need be made at this time whether he qualifies as a member of the class of persons described in (A) or (B) of section 203(a)(7). It is pertinent to note, however, that under the facts presented no claim is being made that the applicant falls within the class of persons described in section 203(a)(7)(B). Insofar as section 203(a)(7)(A) is concerned, the applicant is of a race indigenous to the Chinese mainland and the applicant has testified that he was not a member of any religious sect or group until some time in 1962 after he had left that area. He testified that he never was a member of any political party and had nothing to do with politics. When he was asked as to why he believed he qualified under the proviso to Section 203(a)(7), he stated that it was because he had promised to return to China when he left and had failed

to do so. He readily admitted that this had nothing to do with race, religion, or political beliefs. It would appear, therefore, that the applicant's decision to leave the Chinese mainland was based on his dissatisfaction with the economic system of the Communist government and not at all by reason of persecution or fear of persecution on account of race, religion, or political opinion. As a matter of fact, the record indicates no dissatisfaction from 1949 when the Communists took over the government until 1952 when the applicant's property and assets were expropriated.

On the basis of the facts presented in support of the instant application, I find and conclude that the applicant's physical presence in the United States was not a consequence of his flight from the mainland of China in search of refuge and cannot, therefore, be considered or accepted as qualifying physical presence within the purview of the proviso. His application, therefore, is required to be denied. Since this decision interprets a recently enacted amendment to the Immigration and Nationality Act from which no appeal is provided by law or regulation, the Regional Commissioner, in accordance with 8 CFR 103.4, has directed that it be certified to him for decision.

ORDER: It is ordered that the application for classification as a refugee under the proviso to section 203 (a) (7) of the Immigration and Nationality Act, as amended, be and the same is hereby denied.

IT IS FURTHER ORDERED that the case be certified to the Regional Commissioner for review and final decision in accordance with 8 CFR 103.4.

/s/ George K. Rosenberg
GEORGE K. ROSENBERG
District Director

EXHIBIT (C)

GOULD & DALE
Attorneys at Law
1515 North Broadway
Santa Ana, California 92706
Telephone 547-5641

Attorneys for Applicant

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
LOS ANGELES, CALIFORNIA

File No. A12 684 382

IN THE MATTER OF THE APPLICATION OF
YEE CHIEN WOO, also known as HARRY WOO

For Classification as a refugee under the proviso to section 203(a)(7) of the Immigration and Nationality Act, as amended

AFFIDAVIT OF APPLICANT IN SUPPORT OF APPEAL

Harry WOO being first duly sworn upon oath, deposes and says:

I was residing in Shanghai, China in May 1949 when the Communists took over Shanghai. At the beginning the Communist Government left most of us business men alone, except to compel us to subscribe to government bonds. In early 1950 however, an inventory was made of all of the office machines as well as equipment, furniture, etc., in my business. A communist party "Union" Leader instructed my employees to control the office equipment and not allow me to dispose of any property without permission from the Party.

Shortly thereafter, I was advised that I could not dispose of my automobile because it belonged to the store. Unstated, but as a matter of fact, the store belonged to the State.

In 1951 the government began a "3-anti" campaign against various groups and classes of people. This was

followed by the "5-anti" campaign. During these campaigns, I personally saw truckloads of Chinese with their arms bound behind their backs, driven to an execution ground, and on one occasion, 400 killed at one execution.

At a mock public trial in 1953, in Shanghai, I observed three men "tried" and executed in front of the crowd of on-lookers.

We were directed by the authorities to attend these public executions.

After the executions we were required to report to our neighborhood communist leader and directed to confess any thoughts we had against the Communist regime or the State.

There was absolutely no freedom. One could be arrested at any time. In 1951 I therefore made my first application for an exit visa to get out of Shanghai. When I heard no answer for three months, I went to the authorities to inquire as to my application and was given no answer. After the "3-anti" and "5-anti" campaigns I made another application at the Communist Police Headquarters, for an exit visa. In early 1953 a permit was granted and I entered Hong Kong June 1, 1953.

About three months after I had arrived in Hong Kong I went to the American Consul General's Office to inquire about immigration to the United States. There I talked to a Chinese employee in the Mandarin dialect and asked him what was the procedure to get a visa to go to the United States. He inquired whether I wanted a visitor's visa or an immigrant visa. I told him I wanted an immigrant visa. He said, "If you want to immigrate to the United States you must have relatives or friends in the United States who will sponsor you". I said, "I have no friends or relatives in the United States." He replied, "If you have no relatives and no one who will sponsor you, you are not qualified for a visa."

He then volunteered "Even if you were to get a friend who would sponsor you, you will have to pay your own transportation to the United States which will be over $1000.00 U. S. Can you pay for your transportation?" I said I had no money. Since I was advised I was not qualified, I did not then put in any application.

I first got an identity card in Hong Kong about January 1, 1954.

During this time I went to see an attorney named C. C. Kuo in the Alexander Building in Hong Kong. A friend of mine referred me to him about possibly getting a visa admitting me to the United States or Okinawa. Mr. Kuo said "Okinawa is a United States Air Base; you just got out of Communist China last year, do you think you can go to American territory that easily? No, you are not eligible."

In approximately 1955 I went to the Indonesian Consulate in Hong Kong to try and get a visa to go there. I had some Chinese friends who were in business in Indonesia. The immigrant visa of Indonesia was granted and about the same time, Sukarno began confiscating Chinese business men's property and restricting their operations. My Chinese friends then advised me not to use my visa and go to Indonesia. Later on they migrated to South America.

In 1956 I went to the Brazilian Consulate in Hong Kong to inquire about immigrating to Brazil. I was told that I must have a sponsor in Brazil before I could get an immigrant visa there. As I had no relatives or sponsors I could not obtain a visa.

In 1956 or 1957 I went to a Chinese Relief Organization who helped educated Chinese immigrate to the United States. This organization was located at Tak Hing Street, Number 8, 2nd Floor, in Hong Kong. There I was asked about my formal education, special knowledge and skill and college degrees, if any. Again, I was asked "Have you any friend or relative who will sponsor you for admission to the United States?" I said I had no relatives or friends there. He said to me "You have no chance to get a visa if you do not have a sponsor in the United States." I obtained my visitor's visa to the United States in 1959 to go to the Trade Fair.

I hate the Chinese Communist Government because they have taken away all freedom from the people and because of their confiscating all my property as well as that of my relatives. They will not allow my children to leave China. I have seen how cruel the government

is to anybody who has ever opposed them. I want nothing to do with that form of government and I believe that I qualify as a refugee from China and I fear for my life if I am forced to return to Communist China, because I am against the Communist government there. I have stated this over and over again to all of my friends and acquaintances ever since I left Communist China.

HARRY WOO

Subscribed and sworn to before me
this ..... day of ..... 1966.

_____

Notary Public in and for the County
and State above mentioned

EXHIBIT (D)

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Southwest Region

SAN PEDRO, CALIFORNIA

Office of the Regional Commissioner

Please Refer to This File No.

April 11, 1967

FILE: A12 684 382—Los Angeles

IN RE: WOO, Yee Chien

APPLICATION FOR CLASSIFICATION AS A REFUGEE UNDER THE PROVISO TO SECTION 203(a)(7) OF THE IMMIGRATION AND NATIONALITY ACT

IN BEHALF OF APPLICANT:

Gordon G. Dale
Attorney at Law
1815 North Broadway
Santa Ana, California 92706
(Heard in oral argument)

This case has been certified to the Regional Commissioner following denial by the District Director of an application for refugee status under the proviso to Section 203 (a)(7) of the Immigration and Nationality Act.

Applicant, a 53-year-old married male, is a native and citizen of China born in Shanghai. His wife whom he married in Hong Kong during 1953 is also a native and citizen of China. Of this marriage a son was born in Hong Kong in 1954. Applicant's wife and son entered the United States as visitors on February 7, 1965.

Applicant first entered the United States in 1959 remaining for about four months. His last entry was on May

22, 1960 and he has since remained. On each of applicant's entries he entered as a visitor to conduct business in the United States. It has been established in deportation proceedings before a special inquiry officer that applicant and his wife are unlawfully in the United States and their departure, either voluntarily or by deportation, has been ordered. Although no hearing was held on the minor son, he too has overstayed the period for which admitted and is unlawfully in this country. In an effort to prolong their stay, applications seeking adjustment of status under Section 245 have been submitted by each member of the family. Since nonpreference visas are not available to the family, the husband/father submitted an application (I-590A) seeking classification as a refugee under the proviso to Section 203 (a) (7) of the Act. Approval of this application would confer derivative benefits upon applicant's wife and son and permit the adjustment to permanent residents for the family. As heretofore stated the District Director denied this application and the matter is before the Regional Commissioner on certification.

In brief, applicant's history leading up to his claim to being a refugee within the terms of the statute is as follows:

> He was born in Shanghai, China on January 1, 1913, and from birth until 1953 when he departed to Hong Kong he resided in China. He resided in Hong Kong from 1953 until his entry into the United States in 1960.

Based on these facts the District Director found that since the applicant resided in Hong Kong for several years following his departure from China, he was not a refugee as contemplated by the statute and denied the application. Counsel contends that his client is a refugee, he submits a brief and appeared in oral argument in support of his contention.

The statute under which the instant application was filed reads as follows:

Section 203(a)(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the East, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

The basic facts in the case are set forth in some detail in the District Director's decision of October 24, 1966 and will not be repeated herein. Counsel agrees that the District Director's statement of facts is correct except that applicant's period of authorized stay as a nonimmigrant visitor for business was last extended to expire on March 28, 1966 and not to November 19, 1962 as related by the District Director.

In his decision the District Director makes several findings based on the record. He finds that: (1) Applicant is of a race indigenous to the Chinese mainland; (2) He was not a member of any religious sect or group until 1962 which was after he left China; (3) He never was a member of any political party and had nothing to do with politics; and based on these factors applicant's departure from China was not because of persecution or fear of persecution on account of race, religion or political opinion but that applicant's decision to leave China was based on his dissatisfaction with the economic system of the Communist government. These findings led the District Director to conclude that applicant did not meet the terms of Part (A) of Section 203(a)(7). The District Director also finds that following applicant's departure from China he resided in Hong Kong for several years during which time he opened a business, married and fathered a child. Also that documents issued to him during this time by appropriate Hong Kong authorities permitted applicant to enter, re-enter and reside and remain in Hong Kong and that with these same documents applicant may now re-enter and resume his residence in Hong Kong with his wife and son. Based on these findings the District Director concluded that since applicant's presence in the United States whether computed from his first temporary entry in 1959 or his second on May 22, 1960, was not and is not now a physical presence which was a consequence of his flight in search of refuge from China, he had failed to establish the continuous physical presence in the United States as required in the proviso to Section 203(a)(7). The District Director cites the *Matter of K—*, Int. Dec. 1636, A12 491 782 of September 9, 1966 and refers to the legislative history of the several prior Refugee Relief Acts, the present Act and the regulations and administrative interpretations thereof as fully supporting his conclusion as to what type of physical presence is qualifying under the proviso.

Counsel on the other hand contends that since applicant has been physically present in the United States since his entry on May 22, 1960, he more than meets the mini-

mum two years required by the statute and that his client is a refugee within the contemplation of the statute and eligible for the classification he seeks. In support of his position counsel urges that that part of Interim Decision 1636 holding that only physical presence in the United States which is a consequence of the alien's flight in search of refuge could be considered as qualifying physical presence within the purview of the proviso is dictum and not legal authority. In his argument in this point counsel cites excerpts from several court decisions and previous refugee acts and the legislative history of those acts.

No issue will be taken with counsel concerning his selection of cases, excerpts therefrom, what they mean to him in the way of interpretation or comparison to his client's factual situation and the brief legislative history recited by him. However, it must be pointed out that one salient difference exists between the present and past refugee legislation. Past legislation was temporary in nature and enacted by Congress because of conditions existing in various parts of the world and such legislation was directed towards stretching forth a helping hand to the extent possible to those refugees caught in the then existing conditions. This is evidenced by the expiration dates written into all but the last Refugee Act, July 14, 1960, which was repealed by the present act with the exception of those sections relating to the adjustment of status of the last of the aliens paroled into the United States under its provisions. In passing these several acts it is evident that Congress was concerned over the plight of refugees. However, a study of the legislative history established that this concern was with the refugee who was forced to exist in a camp or other temporary facility and was dependent upon the host country or welfare organizations, local and international, for shelter and the bare essentials of his existence. Congress did not intend that an alien, though formerly a refugee, who had established roots or acquired a residence in a country other than the one from which he fled would again be considered a refugee for the purpose of gaining entry into

and or subsequently acquiring status as a resident in this, the third country. See *Matter of SUN*, Int. Dec. 1685.

The present refugee section is a permanent part of our immigration statutes. While the wording of the first part differs from previous acts, conditional entry in lieu of parole, this difference stems from Congress's desire to use the term conditional entry to avoid any possible stigma that may attach from the term parole. It is with the second or proviso part of the present refugee section where the question of Congressional intent arises.

It becomes apparent from committee reports that in enacting Section 203(a)(7), Congress was providing permanent provisions for the *resettlement* of refugees not unlike the procedures under the Fair Share Refugee Act, except that under Section 203(a)(7) the United States and not the U. N. High Commissioner for Refugees will determine eligibility for refugee status. (Sen. Rep. No. 748, 89th Cong. 1st Sess. 16-17 (1965) and H. Rep. No. 745, 89th Cong. 1st Sess. 15 (1965)). Since Section 203(a)(7) must be considered in the context of the problem of "resettlement" of refugees, it becomes clear, we believe, that Congress intended that the proviso to Section 203(a)(7) apply to "refugees" as that term is defined in the first part of Section 203(a)(7) and not to aliens who although they had fled from their own country were later resettled in another country. To construe congressional intent otherwise would lead to the conclusion that an alien who fled or was forced to leave his country at any time and went to another country where he established himself in business or obtained employment in competition with the local people, acquired a family and social status and perhaps even becomes a property owner, could at anytime later gain entry into the United States and after two years be granted preferred refugee status. This, we believe, Congress certainly did not intend. The objective to Section 203(a)(7) is to provide for the admission and adjustment of status of refugees who have fled from certain areas and found themselves in camps or in otherwise desperate conditions in the countries to which they had escaped.

The burden is upon the alien to establish that he is a refugee within the terms of the statute (F. Sen. V. U.S. 137 Fed. Sup. 236, 234 F.2nd 656). The applicant's testimony establishes that he left his home in China in 1953 and that his permanent home between 1953 and 1960 was in Hong Kong where he initiated a business, married and had a son. He is in possession of a valid document which permits him to enter, depart, work and reside in Hong Kong. Accordingly, applicant has not sustained the burden of establishing his inability to return to Hong Kong or his unwillingness to return thereto on account of race, religion or political opinion. The decision of the District Director will be affirmed.

ORDER: IT IS ORDERED that the decision of the District Director denying the application be and the same is hereby affirmed.

/s/ Harlan B. Carter

Regional Commissioner
Southwest Region

GOULD & DALE
Attorneys at Law
1515 North Broadway
Santa Ana, California 92706
Telephone 547-5641

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 67-104-K

YEE CHIEN WOO, PLAINTIFF

vs.

GEORGE K. ROSENBERG, District Director
IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

COMPLAINT FOR DECLARATORY REVIEW

YEE CHIEN WOO, plaintiff, for his cause of action states:

1. This action is brought pursuant to the provisions of 5 U.S.C. 1009, 8 U.S.C. 1101(a)(15)(J), 8 U.S.C. 1101(a)(27)(C) and 8 U.S.C. 1182(e).

2. Plaintiff was born in Shanghai, China, is a national of China at the present time. Plaintiff last entered the United States on May 22, 1960 as a business visitor. The last extension of his stay as such expired March 28, 1966.

3. An Order to Show Cause and Notice of Hearing on Deportation Proceedings under Section 242 of the Immigration & Nationality Act was served upon plaintiff ordering a hearing on January 26, 1966, and rescheduled to March 8, 1966 in San Diego, California.

4. On said date on March 8, 1966 the Special Inquiry Officer, in Deportation Hearing rendered his decision that plaintiff was deportable on the charge contained in the

Order to Show Cause. He granted plaintiff the privilege of voluntary departure, but ordered plaintiff deported to "The Republic of China on Formosa" in the event he failed to exercise the privilege of voluntary departure. The Special Inquiry Officer, however, refused to entertain plaintiff's application for classification as a refugee under Section 203(a) of the Immigration & Nationality Act as amended at said hearing. (8 U.S.C. 1153).

5. Thereafter said application was filed with the Officer-in-Charge of the Immigration Office in San Diego, California. A copy of said application filed by plaintiff is attached hereto marked Exhibit "A" and is hereby made a part hereof.

6. On October 24, 1966, the defendant District Director of the Immigration and Naturalization Service denied plaintiff's application. A copy of said decision is attached hereto labelled Exhibit "B" and is hereby made a part hereof.

7. The case was certified to the Regional Commissioner of Immigration and Naturalization Service, Southwest Region, San Pedro, California, for review on the same date in accordance with 8 CFR, 103.4.

8. Oral argument was accorded in connection with review of said decision at the office of the Regional Commissioner on December 7, 1966. An affidavit of plaintiff was submitted in connection with this review, a copy of which is attached hereto marked Exhibit "C" and is hereby made a part hereof.

9. On April 11, 1967 the Regional Commissioner affirmed the decision of the District Director denying said application. A copy of said decision is attached hereto and labelled Exhibit "D" and is hereby made a part hereof.

10. Plaintiff contends that under the facts set out in his petition exemplified by Exhibit "A", he is entitled to the relief sought in said petition. Defendant's denial thereof is a departure from any reasonable interpretation of the applicable refugee legislation. Furthermore, said decision ignores the plain, unambiguous meaning of the language of said legislation and seeks to interpret the same according to the view of other directors of dis-

tricts of the Immigration Service and regional commissioners thereof and not incorporated into the enactment. Furthermore, said ruling fails to take into account pertinent facts presented to defendant, to wit: plaintiff is a native and national of China who attested in sworn statements taken in connection with his application on April 13, 1966 and October 4, 1966 to his escape from Red China after arrest, interrogation, and expropriation of his property, detention of all his children, his expressed hatred of the Communist form of Government, and his fear of return to that country therefor, in addition to the facts that he is of the Catholic faith, that he has been physically present in the United States continuously since his last entry on May 22, 1960, thereby establishing clearly, qualification as a refugee, under Section 203(a) 7 of the Immigration and Nationality Act as amended, (8 U.S.C. 1153).

11. By reason of the matters alleged in the preceding paragraph, defendant's decision adverse to plaintiff is arbitrary, an abuse of discretion, and contrary to the plain language of the Statute and to law and court decisions establishing standards for the interpretation of refugee legislation. Plaintiff further contends the defendant erred (a) in concluding the plaintiff was statutorily ineligible for the relief requested, (b) in determining facts in his assessment of plaintiff's compliance with statutory qualifications, (c) in arbitrarily establishing a category of applicants ineligible for the relief provided by Section 203(a)7 of the Immigration & Nationality Act (8 U.S.C. 1153).

WHEREFORE, plaintiff prays that the Court review defendant's aforesaid administrative ruling, interpret the applicable Statute, and order proper administrative action, to wit, the granting of plaintiff's petition for refugee classification under Section 203(a)7 of the Immigration & Nationality Act.

/s/ Gordon G. Dale
GORDON G. DALE
Attorney for Plaintiff

EDWIN L. MILLER, JR.
United States Attorney
JOHN A. MITCHELL
Assistant U. S. Attorney
325 West F Street
San Diego, California 92101
Telephone: 293-5610

Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 67-104-K

YEE CHIEN WOO, PLAINTIFF

v.

GEORGE K. ROSENBERG, District Director
IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM OF POINTS AND AUTHORITIES

NOTICE OF MOTION

TO THE PLAINTIFF, YEE CHIEN WOO, AND TO HIS ATTORNEY, GORDON G. DALE:

PLEASE TAKE NOTICE that on August 4, 1967, at 2:00 p.m., in the courtroom of the Honorable Fred Kunzel, the defendant will bring on his motion to dismiss this case.

DATED: July 19, 1967.

EDWIN L. MILLER, JR.
United States Attorney

/s/ John A. Mitchell
JOHN A. MITCHELL
Assistant U. S. Attorney

MOTION TO DISMISS

Defendant respectfully moves this Court for an order dismissing the plaintiff's complaint on the ground this Court does not have jurisdiction over the subject matter set forth in the complaint.

This motion will be based upon the files and records of this case, the attached memorandum of points and authorities and oral argument to be presented on the date set for hearing.

DATED: July 19, 1967.

EDWIN L. MILLER, JR.
United States Attorney

/s/ John A. Mitchell
JOHN A. MITCHELL
Assistant U. S. Attorney

SOUTHERN DISTRICT OF CALIFORNIA

YEE CHIEN WOO vs. G. K. ROSENBERG No. 61-104-K

___ Hon. JAMES M. CARTER X Hon. FRED KUNZEL

Deputy Clerk	*Reporter*
X Hal H. Kennedy	___ Dorothy Albright
___ Patrick Locantore	X Gene Devlin
___ W. N. Zinn	___ Thos. Lancaster

CIVIL MOTIONS

DATE: Aug. 4, 1967

APPEARANCES:

Plaintiff G. G. Dale, C. Estep — Defendant J. Mitchell, A.U.S.A.

Motion To Dismiss

___ Hearing continued to _____

___ Motion granted X Motion denied ___ Motion submitted

___ Briefs to be field: _____
(pltf) (deft) (Pltf) (deft) (Reply)

X Other: Plaintiff to Prepare Ordered

PRE TRIAL HEARING

DATE:

APPEARANCES:

Plaintiff _____ Defendant _____

_____ _____

_____ _____

___ Pre trial order filed ___ Stipulation and order to be submitted

___ Continued to

Other:

COURT TRIAL

(See part II for Wits. and Exbs.)

APPEARANCES:

Plaintiff _____ Defendant _____

_____ _____

_____ _____

Dates of Trial: _____ _____ _____ _____

___ Judgment for ( ) Plaintiff ( ) Defendant $_____)

___ Findings, etc., and Judgment to be prepared by

( ) Plaintiff
( ) Defendant

___ Submitted ___ Briefs to be filed:

___ Other:

Deputies Initials /s/ H.H.K.
12-12-66

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1515 North Broadway
Santa Ana, California 92706
Telephone 547-5641

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 67-104-K

YEE CHIEN WOO, PLAINTIFF

vs.

GEORGE K. ROSENBERG, District Director
IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

ORDER ON MOTION TO DISMISS

Motion to Dismiss came on regularly to be heard on the 4th day of August, 1967 at the hour of 2:00 P.M., in the courtroom of the Honorable Fred Kunzel, Judge presiding, John A. Mitchell appearing on behalf of the United States Attorney, for defendant and Gordon G. Dale appearing on behalf of the plaintiff, and the matter having been submitted for decision;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion is hereby denied.

DATED: August 10, 1967.

/s/ Fred Kunzel
Judge

EDWIN L. MILLER, JR.
United States Attorney
JOHN A. MITCHELL
Assistant U. S. Attorney
325 West F Street
San Diego, California 92101
Telephone: 293-5610

Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 67-104-K

YEE CHIEN WOO, PLAINTIFF

v.

GEORGE K. ROSENBERG, District Director,
IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

ANSWER

COMES NOW the defendant, GEORGE K. ROSENBERG, District Director, IMMIGRATION AND NATURALIZATION SERVICE, and in answer to plaintiff's complaint, admits, denies and alleges as follows:

1. The defendant denies each and every allegation contained in paragraphs 1, 10 and 11 of the complaint.

2. The defendant admits the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the complaint.

AFFIRMATIVE DEFENSES

3. The defendant alleges that the complaint fails to state the claim upon which relief can be granted by the United States District Court.

4. The defendant alleges that the United States District Court lacks jurisdiction over the subject matter and over the person.

WHEREFORE, the defendant, GEORGE K. ROSENBERG, District Director, IMMIGRATION AND NATURALIZATION SERVICE, prays judgment as follows:

1. That plaintiff take nothing by virtue of his complaint,
2. For its costs and disbursements incurred herein; and
3. For such other relief as the Court deems just.

DATED: August 28, 1967

EDWIN L. MILLER, JR.
United States Attorney

/s/ John A. Mitchell
JOHN A. MITCHELL
Assistant U. S. Attorney

Attorneys for Defendant

EDWIN L. MILLER, JR.
United States Attorney

RAYMOND F. ZVETINA
Assistant U. S. Attorney
325 West F Street
San Diego, California 92101
Telephone: 293-5610

Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 67-104-K

YEE CHIEN WOO, PLAINTIFF

v.

GEORGE K. ROSENBERG, District Director
IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

NOTICE OF MOTION, MOTION AND MEMORANDUM OF FACTS AND LAW

NOTICE OF MOTION

TO THE PLAINTIFF, YEE CHIEN WOO, AND TO HIS ATTORNEY, GORDON G. DALE:

PLEASE TAKE NOTICE that on February 5, 1968, at 2:00 p.m., in the court room of the Honorable Fred Kunzel, the defendant will bring on his motion for summary judgment in this case.

DATED: January 25, 1968.

EDWIN L. MILLER, JR.
United States Attorney

/s/ Raymond F. Zvetina
RAYMOND F. ZVETINA
Assistant U. S. Attorney

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, by his attorney, Edwin L. Miller, Jr., United States Attorney for the Southern District of California, and moves this Honorable Court pursuant to the provisions of the Federal Rules of Civil Procedure, Rule 56(b), for summary judgment in favor of defendant. In support hereof defendant states as follows:

1. This Court is without jurisdiction of the subject matter and the person, by virtue of the provisions of Title 8, United States Code, Section 1105(a), whereby review of final orders of deportation and related matters is vested exclusively in the Court of Appeals.

The defendant incorporates herein by reference the contentions and authorities heretofore advanced in its motion to dismiss, which was previously denied. The attention of the Court is respectfully invited to the recent decision in *Yamada* v. *Immigration & Naturalization Service*, 384 F. 2d 214 (C.A. 9, 1967), suggesting a position contrary to that taken here by defendant.

2. Assuming *arguendo* that this Court has jurisdiction, the action is ripe for determination by summary judgment. The case is before the Court solely on the administrative record, and there is no genuine issue as to any material fact.

3. For the reasons set forth in the attached memorandum of facts and law, defendant's rejection of plaintiff's application for classification as a refugee under Title 8, United States Code, Section 1153(a)(7) was neither unlawful, arbitrary, capricious, nor an abuse of discretion, and therefore the defendant is entitled to summary judgment as a matter of law.

WHEREFORE, defendant moves that the Court grant summary judgment in favor of defendant.

Respectfully submitted,

EDWIN L. MILLER, JR.
United States Attorney

/s/ Raymond F. Zvetina
RAYMOND F. ZVETINA
Assistant U. S. Attorney
Attorneys for Defendant

___ Hon. JAMES M. CARTER — X Hon. FRED KUNZEL

Deputy Clerk — *Reporter*

___ Hal H. Kennedy — ___ Dorothy Albright
___ Patrick Locantore — X Gene Devlin
X W. N. Zinn — ___ Thos. Lancaster

CIVIL MOTIONS

DATE: _____

APPEARANCES:

Plaintiff _____ Defendant _____

_____ _____

_____ _____

_____

_____

_____

___ Hearing continued to _____

___ Motion granted ___ Motion denied ___ Motion submitted

___ Briefs to be filed: _____
(pltf) (deft) (Pltf) (deft) (Reply)

___ Other:

PRE TRIAL HEARING

DATE: 4-29-68

APPEARANCES:

Plaintiff Gordon Dale — Defendant Raymond Zvetina

_____ _____

_____ _____

___ Pre trial order filed ___ Stipulation and order to be submitted

___ Continued to

Other: Ord Pltf have on or before 6/28/68 to file memo
Deft to 7/30 to reply & cause stand submitted

COURT TRIAL

(See part II for Wits. and Exbs.)

APPEARANCES:

Plaintiff _____ Defendant _____

_____ _____

_____ _____

Dates of Trial: _____ _____ _____ _____

___ Judgment for ( ) Plaintiff ( ) Defendant $_____)

___ Findings, etc., and Judgment to be prepared by

( ) Plaintiff
( ) Defendant

___ Submitted ___ Briefs to be filed:

___ Other:

Deputies Initials /s/ W.N.Z.
12-12-66

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 67-104-K

YEE CHIEN WOO, PLAINTIFF

v.

GEORGE K. ROSENBERG, District Director, IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

MEMORANDUM OF DECISION

Plaintiff seeks declaratory review from an order denying his application for classification as a refugee under section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C.A. § 1153(a)(7) (Supp. 1967).

Plaintiff's application was originally filed in connection with a deportation hearing held on March 8, 1966, where he was granted voluntary departure, in lieu of deportation to Formosa. The special inquiry officer refused to entertain plaintiff's application for classification under section 203(a)(7). Subsequently, an application was filed with the Immigration office and on October 24, 1966, the District Director denied the application. The denial was affirmed by the Regional Commissioner of the Southwest Region on April 11, 1967.

The Government's motion to dismiss on the ground that the United States Court of Appeals has exclusive jurisdiction of review by virtue of 8 U.S.C.A. § 1105(a), was denied by reason of the decision in *Yamada* v. *Immigration and Naturalization Service*, 384 F.2d 214 (9th Cir. 1967), and *Tai Mui* v. *Esperdy*, 371 F.2d 772 (2d Cir. 1966), *cert. denied*, 386 U.S. 1017.

Thereafter, the Government filed a motion for summary judgment. This motion is denied, and the decision of the District Director denying plaintiff's application is reversed for reasons hereinafter stated.

Section 203(a)(7) provides for the admission of a limited number of aliens to the United States if:

". . . (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, . . . and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; . . . ."

Since plaintiff was already in the United States on a temporary basis, he applied for a change of status pursuant to section 245 of the Immigration and Nationality Act, 8 U.S.C.A. § 1255 (Supp. 1967).

The facts are contained in a certified copy of the file of the Immigration and Naturalization Service. In 1953 plaintiff was granted a temporary exit visa from Communist China and received permission to enter Hong Kong on June 1, 1953. In December 1953, in Hong Kong, he married. A son was born of the marriage in 1954. Shortly after arriving in Hong Kong plaintiff started a business of taking orders for merchandise and clothing under the name of Harry Woo Trading Company. He entered the United States in 1960 when he received a visa to enter as a business visitor.

It is clear that plaintiff fled Communist China for fear of persecution. The Government fixes upon the express language of section 203(a)(7), i. e., ". . . persecution or fear of persecution on account of race, religion, or political opinion . . .", and argues that plaintiff fled because of economic reasons and, therefore, does not qualify as a refugee. Such a contention ignores the realities of twentieth century world politics. Communist ideology, particularly the Red Chinese variety, makes no distinction between political as opposed to economic beliefs or philosophies. Both capitalist and anticommunist are enemies of the state.

The uncontroverted facts are that plaintiff was a businessman, a capitalist, prior to the communist takeover. Shortly after the communists came to power most businessmen were purged and many executed. In 1952 plain-

tiff was arrested and interrogated for fourteen days. Only after revealing his financial holdings was he released. His business was subsequently confiscated by the state. Plaintiff left Communist China in 1953, penniless. He was allowed to leave only on the condition that he return. This, of course, he did not do.

Therefore, either as a capitalist, an anticommunist, a Catholic, or a "lawbreaker", plaintiff has good reason to fear persecution at the hands of the communists. While he did not convert to Catholicism until 1962, and at the time of his escape was not yet a "lawbreaker", he was a capitalist and an anticommunist. This brings plaintiff within the requirements of section 203(a)(7).

Additionally, the District Director denied plaintiff's application, and the Regional Commissioner affirmed, on the ground that he was not a refugee in that he had been "firmly resettled" in Hong Kong. In support of its position the Government relies on *Min Chin Wu* v. *Fullilove*, 282 F. Supp. 63 (N.D.Cal. 1968); *Matter of Moy*, Int. Dec. 1707 (1967); and *Matter of Sun*, Int. Dec. 1685 (1966). These cases are distinguishable from the instant case in that here plaintiff never intended to remain in Hong Kong permanently.

In *Min Chin Wu*, *supra*, the applicant left Communist China in 1950 and went directly to the Dominican Republic. There are no facts in the opinion indicating that he attempted to immigrate to the United States upon his flight from China or during the fourteen years he owned and operated a business in the Dominican Republic.

In *Moy*, *supra*, the applicant fled from Communist China to Hong Kong in 1949. He remained in Hong Kong until 1956. He then went to Colombia, S. A., and thereafter came to the United States in 1958. At page 4 of the interim decision, the Regional Commissioner stated, "The applicant, to quote from a brief submitted by his former counsel, . . .:

> . . . established that at his domicile in Barranquilla, Colombia, he has a partnership interest in a farm valued at $1,500.00 and has cash savings amounting to $6,000.00 in a Barranquilla bank. He also estab-

lished that he has no intention of abandoning his Colombia residence to which he is able to return (See permit to reenter Colombia which expires January, 1960)."

In *Matter of Sun, supra*, the applicant left Communist China in 1949 and entered Formosa. He lived in Formosa until 1962. While in Formosa he was a member of the armed forces, and later became a representative of the Republic of China to the United Nations from 1962 to 1965. The Regional Commissioner stated:

> ". . . For sixteen of those years he received his livelihood from the Chinese Government of Formosa. The applicant has established himself firmly in that country and obviously has all of the rights of residence and employment there that can be extended to anyone, regardless of place of birth."

The record in the instant case reveals that plaintiff considered Hong Kong a temporary refuge; a way station on the road to permanent resettlement. Plaintiff departed from Communist China friendless and penniless. Having once provided for his physical needs in Hong Kong, he immediately sought information about immigration to the United States. He was advised that without a sponsor in the United States and the necessary funds, he could not immigrate.

During his stay in Hong Kong plaintiff, by hard work and diligence, was able to save enough money to finance several trips to the United States. He is now in a position to provide for himself and his family in this country. Indeed, he has been doing so for the past eight years. His feeling that Hong Kong might not be a safe place to return to is not unfounded.

Plaintiff was prevented from immigrating to the United States in 1953 because of no sponsor and insufficient funds, yet when he stayed in one place and worked to become financially secure he allegedly lost the very status that allowed admittance. In reality, plaintiff had no choice but to stay in Hong Kong until he could afford immigration as a refugee.

Without expressing any opinion as to why Congress chose to omit the "firmly resettled" provision in the amendments to the Refugee Relief Act of 1953, this court finds that plaintiff was never "firmly resettled" and still qualifies as a refugee under the terms of section 203(a)(7). Accordingly, the District Director erred in denying plaintiff's application.

It appears that both the District Director and the Regional Commissioner in this case have not interpreted the statute liberally or as remedial legislation, as have the courts in the past. See *Leong Leun Do* v. *Esperdy*, 309 F.2d 467 (2d Cir. 1962); *Shio Han Sun* v. *Barber*, 144 F. Supp. 850 (N.D. Cal. 1956).

The Regional Commissioner has rendered other decisions which seem contrary in spirit to the Government's decision in this case. See *Matter of Hung*, Int. Dec. 1722 (1967), and *Matter of Rodriguez*, Int. Dec. 1670 (1966).

The case is returned to the defendant for further hearing pursuant to law.

DATED: November 27, 1968

/s/ Fred Kunzel
Chief Judge
U. S. District Court

Copies to:

Gordon G. Dale, Esq.
1815 North Broadway
Santa Ana, California 92706
Attorney for Plaintiff

Hon. Edwin L. Miller, Jr.
United States Attorney
Southern District of California
Attorney for Defendant

I hereby certify that I mailed a copy of this document (together with a copy of the documents listed below) to Gordon G. Dale, Esq., & U. S. Atty. this date of 11-27-68.

WILLIAM W. LUDDY
Clerk

By /s/ [Illegible]
Deputy

EDWIN L. MILLER, JR.
United States Attorney
RAYMOND F. ZVETINA
Assistant U. S. Attorney
325 West F Street
San Diego, California 92101
Telephone: 293-5610

Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 67-104-K

YEE CHIEN WOO, PLAINTIFF

v.

GEORGE K. ROSENBERG, District Director,
IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that George K. Rosenberg, District Director, Immigration and Naturalization Service, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment (memorandum of decision) entered in this action on the 27th day of November, 1968.

DATED: January 27, 1969.

EDWIN L. MILLER, JR.
United States Attorney

/s/ Raymond F. Zvetina
RAYMOND F. ZVETINA
Assistant U. S. Attorney
325 West F Street
San Diego, Calif. 92101
Attorneys for Defendant

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24,334

YEE CHIEN WOO, PLAINTIFF-APPELLEE

vs.

GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, DEFENDANT-APPELLANT

[December 18, 1969]

On Appeal from the United States District Court for the Southern District of California

Before: MERRILL and TRASK, Circuit Judges, and BYRNE, District Judge *

MERRILL, Circuit Judge:

This appeal presents the question whether an alien, otherwise entitled as a refugee to "Seventh Preference" treatment under § 203(a)(7) of the Immigration and Nationality Act,[1] may be denied such treatment on the

* Hon. William M. Byrne, United States District Judge for the District of Central California, sitting by designation.

[1] 8 U.S.C. § 1153(a)(7) added to the Immigration and Nationality Act by the Act of October 3, 1965 (79 Stat. 911), reads as follows:

"Aliens, who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

* * * *

(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 1151(a) (ii) of this title, to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-

ground that he had become firmly resettled elsewhere and that his entry into the United States was not therefore emergent.

Appellee is a native of Shanghai, China. In 1952 his substantial business and financial holdings were confiscated by the Communist Government. He sought and was granted permission to leave Communist China for a foreign visit with the understanding that he would return. In 1953 he went to Hong Kong and has never returned to Communist China.

In Hong Kong he started a business under the name of Harry Woo Trading Company, taking orders for merchandise and clothing. He was married and a son was born. In 1959 he was admitted to the United States temporarily as a visitor for business purposes, to operate a concession at the International World's Fair in Portland, Oregon. He returned to Hong Kong later that year. On May 22, 1960, he made his second entry into the United States as a business visitor in connection with the San Diego Fair and International Trade Mart. He has never since left the United States. His temporary stay expired March, 1966. By this time he had been joined by his wife and child, who had entered Canada and had been admitted to the United States from Canada as visitors for pleasure. Deportation proceedings were commenced upon his failure to depart. On March 8, 1966, he and

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dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area * * * and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode * * * *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

his family were granted voluntary departure. They failed to depart. Also on March 8, 1966, appellee applied for classification as a refugee under § 203(a)(7). He has expressed opposition to communism and believes that should he return to Communist China he would be persecuted as a member of the capitalist class. However, he possesses a valid Hong Kong Certificate of Identity which is sufficient documentation to permit his return to Hong Kong. His application was denied by the District Director, Los Angeles, and that decision was affirmed by the Regional Commissioner, San Pedro, California. The Regional Commissioner held that "Congress did not intend that an alien, though formerly a refugee, who had established roots or acquired a residence in a country other than the one from which he fled would again be considered a refugee for the purpose of gaining entry into and or subsequently acquiring status as a resident in this, the third country," citing *Matter of Sun*, 12 I&N Dec. 36 (1966). The Regional Commissioner concluded that appellee is in possession of a document that permits him to return and reside in Hong Kong; consequently, that he had not established his inability to return to *Hong Kong*, or that he is unable to return thereto on account of race, religion or political opinion.

Upon denial of his application appellee brought the instant suit for declaratory judgment under 28 U.S.C. § 201. The District Court ruled that he was entitled on the facts to the benefits of § 203(a)(7), regardless of the applicability of the "firmly resettled" criterion. The Service has taken this appeal.

We hold that § 203(a)(7) does not require, as a condition precedent to conditional entry, that the alien be "not firmly resettled elsewhere."

The nature of the relationship of the refugee to an intermediate host country to which he has fled from his home country and in which he has found temporary asylum is a necessary consideration under this and prior refugee relief acts.

In the Displaced Persons Act of June 25, 1948 (62 Stat. 1009), Congress excluded those who, after fleeing from their home countries, had been received for "perma-

nent residence" elsewhere. In the Refugee Relief Act of August 7, 1953 (67 Stat. 400), Congress included as a condition precedent the fact that the refugee was "not firmly resettled" elsewhere. In the Refugee Act of September 11, 1957 (71 Stat. 639), however, these words were omitted and the phrase "not a national" (of the intermediate country) was substituted. This substituted language was repeated in the Fair Share Refugee Act of July 14, 1960 (74 Stat. 504-5), and also in the Refugee Assistance Act of June 28, 1962 (76 Stat. 121). It was repeated again in the act now before us.

Whether appellee was firmly resettled in Hong Kong is not, then, relevant. What is relevant is that he is not a national of Hong Kong (or the United Kingdom); that he is a national of no country but Communist China and as a refugee from that country remains stateless.

The Service insists that Congress cannot have intended that "once a refugee always a refugee"; that this "literally would make thousands upon thousands of aliens, formerly refugees and now firmly resettled in host countries eligible to apply for conditional entry." But Congress appears to have met this possibility by specifically limiting the number of those who can claim conditional entry under the "Seventh Preference." In any event we cannot disregard the clear manifestation of congressional intent shown by the substitution, in 1957, of the status "not a national" for that of "not firmly resettled" as formerly specified in the 1953 Act. Nothing in the legislative history advanced by appellant persuades us that Congress intended this substituted language to mean anything but what it clearly says. See *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953); *United States* v. *Rice*, 327 U.S. 742, 752-53 (1946).

Judgment affirmed.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, December 18th, 1969

Before: MERRILL and TRASK, Circuit Judges, and BYRNE, District Judge

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

ORDERED that the type written opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24334

YEE CHIEN WOO, PLAINTIFF-APPELLEE

vs.

GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, DEFENDANT-APPELLANT

JUDGMENT

APPEAL from the United States District Court for the Southern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Dec. 18, 1969

SUPREME COURT OF THE UNITED STATES

No. 156, October Term, 1970

GEORGE K. ROSENBERG, District Director, PETITIONER

v.

YEE CHIEN WOO

ORDER ALLOWING CERTIORARI—Filed October 19, 1970

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 410753 374

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ———

GEORGE K. ROSENBERG, DISTRICT DIRECTOR,
PETITIONER

v.

YEE CHIEN WOO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the District Director of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on December 18, 1969.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 9-13) is reported at 419 F.2d 252.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, p. 14) was entered on December 18, 1969. On

March 23, 1970, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including May 16, 1970. This court has jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien refugee from the mainland of China who fled to Hong Kong in 1953, and thereafter lived in Hong Kong for approximately seven years, is entitled to immigration benefits as a refugee under Section 203(a)(7) of the Immigration and Nationality Act.

STATUTE INVOLVED

Section 203(a)(7) of the Immigration and Nationality Act, as added, 79 Stat. 913, 8 U.S.C. (Supp. IV) 1153(a)(7), provides as follows:

> Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are

not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

STATEMENT

Respondent is a native and citizen of China who left Communist China in 1953 and has never returned there. He then went to Hong Kong and was married there the same year. He continued to reside with his wife in Hong Kong until 1960, and a child was born to them in Hong Kong.

In 1960, respondent came to the United States as a temporary visitor for business. His temporary stay expired in 1966 but he remained unlawfully in the United States. His wife and child in the meantime came to the United States in 1965 as temporary visitors and likewise overstayed their temporary period of admission. A joint deportation hearing against

respondent and his wife resulted in an order for their deportation in 1966.

Respondent then applied for refugee status under Section 203(a)(7) of the Immigration and Nationality Act, as added, 8 U.S.C. 1153(a)(7), which would have permitted him to remain in the United States permanently. Petitioner denied the application and certified the case to the regional commissioner for review. In 1967, the regional commissioner affirmed the denial of the application, finding that although respondent was once a refugee, he had lost that status when he became a resident of a third country. The regional commissioner found that respondent had been given residence privileges in Hong Kong and had occupied an apartment there with his family; that he had operated a business in Hong Kong until 1960; that he had a document entitling him to return to that country, and that respondent admittedly would be permitted to resume his residence and re-establish his business in Hong Kong.

Respondent then brought a suit in the district court to review the denial of his application for refugee status. The district court ruled in his favor, finding that he had not become firmly settled in Hong Kong. 295 F.Supp. 1370. On appeal the Court of Appeals for the Ninth Circuit affirmed, holding that it was irrelevant, for purposes of Section 203(a)(7), whether respondent was firmly resettled in Hong Kong, since it read that statute as granting benefits to a refugee from the country of his nationality, even though he was granted residence privileges in a third country. 419 F.2d 252.

REASONS FOR GRANTING THE WRIT

1. It is clear that respondent was a refugee from mainland China in 1953. Thereafter, however, he was granted stable residence rights in a third country to which he can now return. Our contention is that he can no longer claim refugee status.

As the court below pointed out, earlier refugee statutes specifically precluded benefits to refugees who had been firmly resettled elsewhere, and the present statute has omitted that specific preclusion. However, the legislative history indicates that when Congress established the conditional entry dispensation for refugees in 1965, it did not intend to change previous criteria under which refugees were admitted to the United States on parole. See S. Rep. 748 (pp. 16-17), H. Rep. 745 (pp. 15-16), 89th Cong., 1st Sess. Moreover, the interpretation of the court below overlooks that Section 203(a)(7) was intended to give special benefits to refugees who could not return to their homes because they feared persecution there. In our view, it was not intended to benefit those who were once refugees but who had since established stable homes to which they could now return. When he came to the United States as a visitor in 1960, petitioner's home was in Hong Kong, where he admittedly still is welcome as a resident and businessman. Therefore we believe he is not entitled to benefits as a refugee under Section 203(a)(7).

2. Only a maximum of 10,200 refugees can be admitted each year as conditional entrants under Section 203(a)(7). This small allotment is reserved

for those who have no homes to which they can return, since they face persecution if they return to their homes. By authorizing use of this category for persons who no longer are actually refugees, the court below makes possible the shutting off of asylum opportunities for other persons who are now homeless. The issue in this case is thus of wide importance, and affects a considerable number of cases pending in the administrative and judicial processes. Several district courts have come to conclusions contrary to that expressed by the court below.

An appeal from one such decision was argued before the United States Court of Appeals for the Second Circuit on February 26, 1970, and is awaiting decision by that court. *Peter Chow Lung Shen* v. *Esperdy*, No. 34212. Because of the pendency of the *Shen* case in the Second Circuit, we sought and obtained an extension of time to petition for certiorari. But no decision has yet been rendered and our time is about to expire. This petition is accordingly filed in order to preserve the issue in the event there is a conflict of circuits. We shall advise the Court when the *Shen* case is decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

CHARLES GORDON,
General Counsel,
Immigration and Naturalization Service.

MAY 1970.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24,334

YEE CHIEN WOO, PLAINTIFF-APPELLEE

v.

GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Southern District of California

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Before: MERRILL and TRASK, Circuit Judges, and BYRNE, District Judge *

MERRILL, Circuit Judge:

This appeal presents the question whether an alien, otherwise entitled as a refugee to "Seventh Preference" treatment under § 203(a)(7) of the Immigration and Nationality Act,[1] may be denied such treatment on the ground that he had become firmly resettled elsewhere and that his entry into the United States was not therefore emergent.

Appellee is a native of Shanghai, China. In 1952 his substantial business and financial holdings were

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* Hon. William M. Byrne, United States District Judge for the District of Central California, sitting by designation.

confiscated by the Communist Government. He sought and was granted permission to leave Communist China for a foreign visit with the understanding that he would return. In 1953 he went to Hong Kong and has never returned to Communist China.

In Hong Kong he started a business under the name of Harry Woo Trading Company, taking orders for merchandise and clothing. He was married and a son was born. In 1959 he was admitted to the United States temporarily as a visitor for business purposes, to operate a concession at the International World's Fair in Portland, Oregon. He returned to Hong Kong later that year. On May 22, 1960, he made his second entry into the United States as a business visitor in connection with the San Diego Fair and International Trade Mart. He has never since left the United States. His temporary stay expired March, 1966. By this time he had been joined by his wife and child, who had entered Canada and had been admitted to the United States from Canada as visitors for pleasure. Deportation proceedings were commenced upon his failure to depart. On March 8, 1966, he and his family were granted voluntary departure. They failed to depart. Also on March 8, 1966, appellee applied for classification as a refugee under § 203(a)(7). He has expressed opposition to communism and believes that should he return to Communist China he would be persecuted as a member of the capitalist class. However, he possesses a valid Hong Kong Certificate of Identity which is sufficient documentation to permit his return to Hong Kong. His application was denied by the District Director, Los Angeles, and that decision was affirmed by the Regional Commissioner, San Pedro, California. The Regional Commissioner held that "Congress did not intend that an alien, though formerly a refugee, who had established roots or ac-

quired a residence in a country other than the one from which he fled would again be considered a refugee for the purpose of gaining entry into and or subsequently acquiring status as a resident in this, the third country," citing *Matter of Sun*, 12 I&N Dec. 36 (1966). The Regional Commissioner concluded that appellee is in possession of a document that permits him to return and reside in Hong Kong; consequently, that he had not established his inability to return to *Hong Kong*, or that he is unable to return thereto on account of race, religion or political opinion.

Upon denial of his application appellee brought the instant suit for declaratory judgment under 28 U.S.C. § 201. The District Court ruled that he was entitled on the facts to the benefits of § 203(a)(7), regardless of the applicability of the "firmly resettled" criterion. The Service has taken this appeal.

We hold that § 203(a)(7) does not require, as a condition precedent to conditional entry, that the alien be "not firmly resettled elsewhere."

The nature of the relationship of the refugee to an intermediate host country to which he has fled from his home country and in which he has found temporary asylum is a necessary consideration under this and prior refugee relief acts.

In the Displaced Persons Act of June 25, 1948 (62 Stat. 1009), Congress excluded those who, after fleeing from their home countries, had been received for "permanent residence" elsewhere. In the Refugee Relief Act of August 7, 1953 (67 Stat. 400), Congress included as a condition precedent the fact that the refugee was "not firmly resettled" elsewhere. In the Refugee Act of September 11, 1957 (71 Stat. 639), however, these words were omitted and the phrase "not a national" (of the intermediate country) was substituted. This substituted language was repeated

in the Fair Share Refugee Act of July 14, 1960 (74 Stat. 504-5), and also in the Refugee Assistance Act of June 28, 1962 (76 Stat. 121). It was repeated again in the act now before us.

Whether appellee was firmly resettled in Hong Kong is not, then, relevant. What is relevant is that he is not a national of Hong Kong (or the United Kingdom); that he is a national of no country but Communist China and as a refugee from that country remains stateless.

The Service insists that Congress cannot have intended that "once a refugee always a refugee"; that this "literally would make thousands upon thousands of aliens, formerly refugees and now firmly resettled in host countries eligible to apply for conditional entry." But Congress appears to have met this possibility by specifically limiting the number of those who can claim conditional entry under the "Seventh Preference." In any event we cannot disregard the clear manifestation of congressional intent shown by the substitution, in 1957, of the status "not a national" for that of "not firmly resettled" as formerly specified in the 1953 Act. Nothing in the legislative history advanced by appellant persuades us that Congress intended this substituted language to mean anything but what it clearly says. See *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953); *United States* v. *Rice*, 327 U.S. 742, 752-53 (1946).

Judgment affirmed.

FOOTNOTES

1. (*Page 1*) 8 U.S.C. § 1153(a)(7) added to the Immigration and Nationality Act by the Act of October 3, 1965 (79 Stat. 911), reads as follows:

"Aliens, who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

* * * *

(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 1151(a)(ii) of this title, to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area * * * and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode * * * *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24334

YEE CHIEN WOO, PLAINTIFF-APPELLEE

vs.

GEORGE K. ROSENBERG, District Director, Immigration and Naturalization Service, DEFENDANT-APPELLANT

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Dec. 18, 1969

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 384374 694

IN THE

Supreme Court of the United States

October Term, 1970
No. 156

GEORGE K. ROSENBERG, Director,

Petitioner,

vs.

YEE CHIEN WOO.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI.

Introduction.

The opinion of the Court of Appeals, the basis for jurisdiction, the question presented, the statute involved, and the statement of facts contained in the Solicitor General's Petition for Writ of Certiorari are correctly set forth in his petition.

Reasons for Denying the Writ.

1. The petition for the writ should be denied inasmuch as it was not duly filed. A writ of certiorari must be filed within ninety (90) days from the day of judgment (28 U.S.C. 2101). The judgment of the Court of Appeals of the 9th Circuit was entered December 18, 1969. The government sought an extension of the ninety (90) day period in March 1970. Counsel does not have evidence of the exact date in March that the extension was requested. The extension was granted by Justice Douglas on March 23, 1970, well beyond

the ninety (90) day period of time for filing the petition for writ of certiorari.

Paragraph 2 of Rule 34 requires applications for extensions to be submitted at least ten (10) days before the expiration of the ninety (90) day period.

Paragraph 2 of Rule 34 states that an extension will not be granted except in the most extraordinary circumstances if filed during the last ten (10) days of such period. The period expired March 17, 1970. The Solicitor General's application for extension of time was filed sometime in March, but counsel's copy of the application for extension merely indicates that it was filed during the month of March and is undated. It is counsel's opinion that it was not filed within the period of time required by Paragraph 2 of Rule 34 nor were the "extraordinary circumstances" set forth to justify considering the application during the last ten (10) days between March 7th and March 17th, 1970.

2. Petitioner is in error in his petition in stating that the legislative history indicates that when the conditional entry provision of the Immigration Act of 1965 was passed that Congress intended to apply criteria used under previous refugee acts. It is true that in the Refugee Relief Act of 1953 (67 Stat. 400) the words "not firmly resettled" were included as a condition precedent to eligibility for refugee classification. What petitioner failed to show in his petition was that in four subsequent refugee acts these words were omitted in defining who was a refugee under each of those acts. These included the Refugee Act of September 11, 1957 (71 Stat. 639), which used the term "not a national" in lieu of "not firmly resettled"; the Act of July 14, 1960 (74 Stat. 504-5); the Act of June 28, 1962 (76 Stat. 121);

and this statute, the Act of 1965. In each of the four refugee statutes after the 1953 Act, Congress modified various portions of each refugee act but did not see fit to reinstate "firm resettlement" in any of these subsequent statutes. The inescapable conclusion, as reached by the Court of Appeals in the 9th Circuit in this case, is that Congress did not intend to reinstate the firm resettlement bar of the 1953 Refugee Act. To claim otherwise, as does the petitioner, is to seek a "mythical Congressional 'intent' in order to resolve the issue at hand". *Leong Leun Do v. Esperdy*, 309 F. 2d 467 (2nd Cir. 1962).

3. The recent decision of the Court of Appeals in the Second Circuit *Shen v. Esperdy* No. 34212 decided June 8, 1970 is easily distinguishable on a factual basis from this case. Shen left Mainland China with all his family and went to Taiwan, the seat of government and the sole territory remaining to the Chinese Nationalist Government. This government, of course, is the only one accorded diplomatic recognition by the United States. Shen, his parents, and his brothers and sisters all established residence in Taiwan and indeed all the remaining members of the family were still in Taiwan. Shen was a minor of the age of 13 at the time he commenced residing on Taiwan. He completed his schooling there and obtained employment with the United States Air Force. He traveled from Taiwan on a Chinese Nationalist passport, was employed in the United States Embassy in Australia for two years and then went to Japan where he studied for three years. Upon completion of his studies, he came to the United States as a visitor. An examination of the facts in *Woo's* case shows an entirely different situation. These facts

are correctly set forth in the government's petition. The only additional fact to be mentioned is that Woo had a certificate of identity issued by the Hong Kong government which expired in 1967.

Hence, even if the doctrine of "firm resettlement" were to be applied under this statute, the District Court found in *Woo's* case he had never been firmly resettled in Hong Kong (295 Fed Supp. 1370). Accordingly, unlike Shen, Woo has established eligibility under 203-(a)7 of the 1965 Act.

Conclusion.

Wherefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

GORDON G. DALE,

Attorney for Respondent.

August 20, 1970.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 156

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, PETITIONER

v.

YEE CHIEN WOO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (A. 40) is reported at 419 F. 2d 252. The opinion of the district court (A. 46) is reported at 295 F. Supp. 1370.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1969 (A. 51). On March 23, 1970, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including May 16, 1970. The petition for a writ of certiorari was filed on May 13, 1970, and granted on October 19, 1970 (A. 51). This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien who firmly resettled in a non-Communist country for 7 years after flight from a Communist country is eligible for an immigrant quota preference within the meaning and intent of Section 203(a)(7) of the Immigration and Nationality Act.

STATUTE INVOLVED

Section 203 of the Immigration and Nationality Act of 1952, as added, 79 Stat. 912, 8 U.S.C. (Supp. V) 1153, provides in pertinent part:

> (a) Aliens who are subject to the numerical limitations specified in section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> * * * * *
>
> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or

unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

STATEMENT

Respondent is a native of Communist China who left there in 1953 and has never returned. In 1953 he went to Hong Kong and opened a clothing business; he was married there the same year and subsequently had a son. He lived in Hong Kong continuously from 1953 until 1959, when he came to this country as a visitor for business. He returned to Hong Kong in 1959 and continued to reside there with his wife and child until 1960 (A. 7–9).

On May 22, 1960, respondent came to the United States as a temporary visitor for business to attend the San Diego Fair and International Trade Mart, where he sold merchandise imported from his business in Hong Kong. He maintained his business in Hong Kong until some time in 1965. His authorized temporary stay in the United States expired in 1966, but he remained here unlawfully; his wife and child had come to the United States in 1965 (after a stopover in Canada) as temporary visitors and likewise overstayed their temporary period (A. 9). A joint deportation hearing against respondent and his wife resulted in an order for their deportation in 1966 unless they voluntarily departed, which they did not do.[1] (A. 9).

On March 8, 1966, the same date on which the deportation orders were entered, respondent filed with the Immigration Service an application under the proviso of Section 203(a)(7) of the Act seeking classification as a refugee (A. 3-5).[2] His application alleged that he had been a businessman on the mainland of China, that the Communists expropriated his business, and that he fled from Communist China in

[1] The order has not been challenged.

[2] The proviso to Section 203(a)(7), and the regulations thereunder (8 C.F.R. 245.4), provide that an alien who has been continuously physically present in the United States for at least two years, who believes that he meets the pertinent requirements of the Section's general provisions and who desires to acquire the status of a permanent resident under the terms of that proviso, may apply to the appropriate district director for classification as a refugee.

1953 (A. 4). When interviewed by an immigration officer in 1966, in connection with this application, respondent stated that he had no property, assets or relatives in Hong Kong (A. 8–9).

The District Director denied respondent's application on the ground that he was ineligible for the refugee preference since he had become firmly resettled in Hong Kong following his flight from Communist China (A. 11–13). On April 11, 1967, the Regional Commissioner affirmed the denial of the application (A. 23–24).

On May 9, 1967, respondent filed the instant action in the United States District Court for the Southern District of California to review the denial of his application (A. 25). The district court concluded that respondent had not firmly resettled in Hong Kong, on the ground that he did not intend to remain there permanently, and remanded the case (295 F. Supp. 1370; A. 40). Upon this view of the facts, that court found it unnecessary to decide whether firm resettlement in Hong Kong would preclude respondent's classification as a refugee under Section 203(a)(7) of the Act. On the government's appeal, the court of appeals affirmed the district court order, but on a different ground. It held that it was irrelevant, for purposes of Section 203(a)(7), whether respondent was firmly resettled in Hong Kong, since it read that section as granting benefits to a refugee even though he had become firmly resettled after the occurrence of the circumstances which caused him to become a refugee. It there-

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fore ruled as a matter of statutory construction that the Regional Commissioner erred in denying respondent's application (419 F. 2d 252; A. 46).

ARGUMENT

INTRODUCTION AND SUMMARY

Section 203(a)(7) of the Immigration and Nationality Act of 1952, as added in 1965 (8 U.S.C. 1153 (a)(7)), is the first permanent provision in the immigration law for a limited annual world-wide quota preference for refugees.

It provides in essence that aliens abroad may apply in any non-Communist or non-Communist-dominated country for conditional entry into the United States if (i) they have fled from any Communist or Communist-dominated country or area because of persecution or fear of persecution for reasons of race, religion, or political opinion, and (ii) are remaining away from such country or area for those reasons, and (iii) are not nationals of the country in which they apply for conditional entry. The proviso to Section 203(a)(7) and the regulations thereunder (8 C.F.R. 245.4) provide further that an alien who has been continuously present in the United States for at least two years may, if he believes that he meets the refugee requirements of the Section's general provisions and desires to acquire the status of a permanent resident, apply to the appropriate district director for classification as a refugee.

The court of appeals in this case held that the benefits of this section are available to aliens who, follow-

ing their initial dislocation from their home country, have become firmly resettled in another country outside the United States.[3] Its construction of the statute is contrary to the decision of the Second Circuit in *Shen* v. *Esperdy*, 428 F. 2d 293, and the consistent administrative interpretation of the provision.[4] The application of the present decision to the world wide pool of firmly resettled refugees would have the detrimental effect of subjecting the small 10,200 annual quota to continuous oversubscription and exhaustion. In practical effect, this means that other aliens who are in fact homeless may well be denied relief.

As we shall show, this was not the intent of the present legislation or of the legislative background from which it stemmed. The history of temporary refugee legislation leading up to Section 203(a)(7) shows that Congress (and the administrative authorities) consistently excluded resettled refugees from the benefits of this type of remedial legislation. The Displaced Persons Act of 1948 and the Refugee Relief Act of 1953 both contained express limitations bottomed on "firm resettlement." The Refugee Relief Act of 1957, although not expressly incorporating

[3] The United States recognizes no general right of political asylum. *Soewapadji* v. *Wixon*, 157 F. 2d 289, 290 (C.A. 9) certiorari denied, 329 U.S. 792; *Ex parte Kurth*, 28 F. Supp. 258, 263–264 (S.D. Cal.). See also United States reservation to Convention on Asylum, Havana, 1928, reported in II Hackworth, *Digest of International Law* 647. Refugees may be admitted to this country only in accordance with the specific terms and conditions set by Congress.

[4] See *Matter of Ng*, 12 I&N Dec. 411; *Matter of Moy*, 12 I&N Dec. 117; *Matter of Sun*, 12 I&N Dec. 36.

such a limitation, was a special statute administered throughout under firmly resettled principles pursuant to Department of State regulations. The primary purpose of the "Fair Share Act" of 1960 was support of the United Nations World Refugee Year program to liquidate the remaining displaced persons camps in Europe. Although, like the 1957 Act, it contained no express "firm resettlement" limitations, the legislative history shows that this legislation also was not intended to apply to refugees who had firmly resettled in the country of initial asylum.

Against this background Congress in 1965 passed the present Section 203(a)(7) as permanent remedial legislation providing an annual refugee quota of 10,200. This provision was almost identical in its definitional language with the 1957 and 1960 Acts. The legislative history indicates that here too Congress intended to allocate a permanent flexible quota for dislocated persons in emergency situations. With the exception of the instant decision, the courts which have been confronted with the issue have ruled that the present refugee statute does not apply to aliens who were once refugees but are now "firmly resettled" in some other country.[5]

The view of the court below is predicated upon a formalistic reading of statutory language divorced from any analysis of the complex legislative back-

[5] In addition to *Shen* v. *Esperdy*, *supra*, see *Min Chin Wu* v. *Fullilove*, 282 F. Supp. 63 (N.D. Cal.); *Ou Yeung* v. *District Director*, No. 68-1563-F. (C.D. Cal.), February 6, 1969.

ground from which the present statutory provision arose. The Second Circuit in *Shen* v. *Esperdy, supra,* has carefully analyzed the legislative framework; and it has concluded—rightly we submit—that this was not Congress' intent but contrary to it. Even though a person has been uprooted from his homeland by some political upheaval or natural calamity, once he has found security in a place where he has the opportunity to establish himself—as respondent did in Hong Kong—the statute requires him to effectuate any subsequent desire to transfer his residence to this country under ordinary immigration channels, not pursuant to special provisions reserved for persons who are still homeless refugees.

THE LEGISLATIVE HISTORY OF THE PRESENT STATUTE PLAINLY SHOWS THAT THE RELIEF IT PROVIDES IS NOT AVAILABLE TO A REFUGEE WHO HAS FIRMLY RESETTLED IN A COUNTRY THAT OFFERS HIM A PERMANENT HAVEN

A. THE LEGISLATIVE BACKGROUND

1. The period 1947-1960

a. At the end of World War II, there were some eight million displaced persons in Europe; seven million of these had accepted repatriation, leaving one million as a problem of international concern.[6] On December 15, 1946, the United Nations General Assembly approved a draft constitution of a proposed International Refugee Organization (IRO). In the

[6] *Displaced Persons in Europe*, S. Rep. No. 950, 80th Cong., 2d Sess. 2-3, 8.

United States, a Senate Resolution (S. Res. 137) authorized the Committee on the Judiciary to make a full investigation of the entire immigration situation, including the problem of displaced persons in Europe. On March 2, 1948, the Committee submitted its report (S. Rep. 950, 80th Cong., 2d Sess.) and reported out a bill (S. 2242) that was enacted as the Displaced Persons Act 1948. 62 Stat. 1009. Section 2(b) of the Act defined a "[d]isplaced person" in terms of the Constitution of the International Refugee Organization, which provided, *inter alia,* that refugees and displaced persons would cease to be of concern to the Organization upon their return to countries of their nationality in United Nations territory, their acquisition of new nationality, or *their firm establishment* otherwise (Annex I, Part I, Section D; S. Rep. 950, *supra,* at p. 68).[7]

[7] Section 2(c) defined an "[e]ligible displaced person" as a displaced person, as defined in Section 2(b), who on or after September 1, 1939, and before December 22, 1945, entered Germany, Austria, or Italy and on January 1, 1948, was in an Allied sector or zone of those countries; also included as an eligible displaced person was one who had previously resided in Austria or Germany and had been either detained therein or left, as a result of persecution by the Nazi government, but had later been returned to Austria or Germany as a result of enemy action, or circumstances of war and, on January 1, 1948, had not been firmly resettled therein. Although firm resettlement is specified here as a disqualifying factor only for those displaced persons who had previously resided in Germany or Austria and had been returned thereto, both categories of "eligible displaced persons," as defined in Section 2(c) of the Act incorporate by reference the requirement of being "the concern of" IRO.

b. Dissatisfaction with this legislation, including its 1948 cut-off date,[8] resulted in concerted efforts at amendment. Divine, *American Immigration Policy, 1924–1952*, pp. 130–132, Yale University Press, New Haven, 1957. As finally enacted after a conference report (H. Rep. 2187, 81st Cong., 2d Sess.), the amendment retained the incorporation of the provisions of IRO's constitution.[9] It further explicitly provided that firm settlement or firm resettlement would render an applicant ineligible for each category of displaced persons recognized in the act; excluded from this limitation were orphans and a special group numbering only 500 whose admission into the United States was to be recommended by the Secretaries of State and Defense.[10]

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[8] See note 7, *supra*. This concern regarding the cut-off date stemmed from the burgeoning problem of refugees fleeing from Communist countries. In its final form, the amended legislation dealt with this problem by extending the "cut-off" date to 1949 and increasing the number of eligible displaced persons to 341,000 (64 Stat. 219, 221).

[9] There had been a proposal to divorce the definition of a displaced person from the pertinent provisions of IRO's constitution; this proposal significantly made it explicit, however, that the concept of firm settlement or firm resettlement would disqualify an applicant. S. Rep. 1237, 81st Cong., 2d Sess. 7.

[10] The recognized categories of displaced persons included three new ones—European refugees in the Far East, honorably discharged veterans of the Polish Army, and certain Greek immigrants. The conferees specified that Far East refugees would be disqualified if they had been received for permanent residence in any country other than the United States and that firm settlement or resettlement would disqualify applicants under the other two new categories (see H. Rep. 2187, 81st Cong., 2d Sess. 4, 5, 13, 14).

This highly complicated legislation, hammered out after much debate and controversy, provided at all stages that firm resettlement would disqualify a prospective immigrant under the Act. That this requirement was not discussed in any of the reports is hardly surprising in the circumstances; it proves only that no discussion was deemed necessary since all accepted resettlement as an essential limitation. After all, this was legislation seeking solution of the displaced persons problem, which stressed that resettlement had to be achieved through an international cooperative effort.[11]

c. As thus amended, the 1948 Act expired on December 31, 1951 (65 Stat. 96). On May 15, 1953, at the recommendation of President Eisenhower, a bill was introduced (S. 1917) to authorize 240,000 special quota immigrant visas to certain escapees, German expellees, and nationals of Italy, Greece and the Netherlands; the Senate Committee on the Judiciary reported favorably on this proposal with amendments, characterizing it as a temporary provision designed to meet an emergency situation, to extend over a period of three years (S. Rep. 629, 83d Cong., 1st Sess. 1-3, 7 (1953)). As finally passed on August 7, 1953 (67 Stat. 400), the Refugee Relief Act included a specific

[11] Section 3(a) of the Act, as amended, imposed upon the Secretary of State the duty of procuring the cooperation of other nations, particularly the members of the International Refugee Organization, in the solution of the displaced persons problem by their accepting for resettlement shares of displaced persons (64 Stat. 221; 65 Stat. 96).

"firm resettlement" exception in its definition of a refugee, as follows:

> Sec. 2. (a) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.[12]

d. When the Refugee Relief Act expired at the end of 1956, over 18,000 of the numbers which might have been allotted for visas remained unused. A bill passed in 1957 permitted the visas to be divided among "refugee-escapees."[13] 71 Stat. 639, 643–644. Although not expressly referring to the concept of resettlement, this legislation was uniformly administered under Depart-

[12] In H. Conf. Rep. 1069, 83d Cong., 1st Sess. 10, managers on the part of the House stated that although "firm resettlement" is not a defined term, it was not designed to exclude prospective beneficiaries of the legislation automatically on the ground that they have been collectively, by law or edict, granted full or limited citizenship rights and privileges in any area of their present residence. This statement suggests that *individual* circumstances showing firm resettlement was the crucial consideration in determining eligibility under this legislation.

[13] A refugee-escapee was defined as "any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion." 71 Stat. 643, Section 15(c)(1).

ment of State regulations as excluding firmly resettled aliens from its benefits.[14]

2. The "Fair Share" Act of 1960

On December 5, 1958, the United Nations adopted a resolution to establish a World Refugee Year to focus interest on the refugee problem; an important purpose was to encourage countries to provide permanent refugee solutions, through voluntary repatriation, resettlement or integration. On May 19, 1959, President Eisenhower issued a proclamation declaring the year beginning July 1, 1959, World Refugee

[14] 22 C.F.R. 44.1 (1958), published in 22 F.R. 10826, December 27, 1957, provided in pertinent part as follows:

> § 44.1 *Definitions.* The following definitions, in addition to the pertinent definitions contained in section 15 of the act of September 11, 1957, section 101 of the Immigration and Nationality Act and Part 42 of this chapter, shall be applicable to this part:
>
> * * * * *
>
> (d) "Firmly resettled" means the status of an alien, who at any time after the occurrence of events which form the basis of his claim to a refugee status, has been reestablished in a home under circumstances which indicate his intention and assure him a reasonable opportunity of remaining permanently. Nothing in this paragraph shall be construed as an exclusive definition of the term "firmly resettled" inasmuch as the facts and circumstances in the individual case must necessarily determine the question of firm resettlement.
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> * * * * *
>
> (f) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, *who has not been firmly resettled and who is in urgent need of assistance for the essentials of life or for transportation.* [Emphasis added.]

Year in support of the United Nations objectives. (S. Rep. No. 1651, 86th Cong., 2d Sess., p. 6; H. Rep. No. 1433, 86th Cong., 2d Sess., p. 4). The resulting "Fair Share" Act, 74 Stat. 504, was the immediate predecessor of the current Section 203(a)(7) of the Immigration and Nationality Act. It provided for use of the Attorney General's general power to parole aliens under Section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. 1182(d)(5).[15]

The "fair share" provision was introduced into the legislation by the House Committee on the Judiciary. H. Rep. 1433, 86th Cong., 2d Sess. 1. The report pointed out (*id.* at 3–4)):

> There remain in Europe at the present time a residue of displaced persons and refugees enjoying the assistance and legal protection of the United Nations High Commissioner for Refugees under a mandate established pursuant to Resolution 428(V) adopted by the General Assembly of the United Nations on December 14, 1950. An internationally concerted effort is being made to find *resettlement opportunities in the countries of the free world for these refugees. The primary purpose of that drive is to*

[15] The Act provided in general for parole into the United States of alien refugee-escapees, as defined in the Act of September 11, 1957 (see *supra*, n. 13), who applied for parole while physically present within the limits of any country which was not Communist, Communist-dominated, or Communist-occupied, who were not nationals of the area in which the application was made, and who were within the Mandate of the United Nations High Commissioner for Refugees. The number of refugee-escapees to be admitted to the United States for permanent residence under this program was to be determined as 25% of the number of similar "resettlement opportunities" afforded by other cooperating countries.

> *close the several refugee camps still maintained after the 15 years which have elapsed since the end of World War II.* This effort is stimulated by the resolution of the General Assembly of the United Nations adopted on September 5, 1958, for the purpose of promulgating the World Refugee Year beginning on July 1, 1959. The resolution was submitted by the United Kingdom and cosponsored by the United States and eight other nations. * * * Implicit in the resolution is the hope that new sources of assistance for refugees will be found during the World Refugee Year, such help including (1) financial and material assistance in the integration into the local economies of those refugees who are unable or unwilling to move from the countries of first asylum and (2) *by offering resettlement opportunities for those who fall in the category of "emigrables."* The latter term includes refugees who desire to emigrate, mostly overseas, and fit into the existing framework of immigration requirements set up by countries willing to accept new settlers. * * * [Emphasis added.]

The fact that the Fair Share Act did not make specific reference to the firm resettlement concept or incorporate by reference international criteria containing such limitations is not significant; that notion was emphasized in the legislative reports.[16] Congress thus made it clear that the Attorney General's parole

[16] At all events, as the Second Circuit pointed out in *Shen v. Esperdy*, *supra*, 428 F. 2d at 300, the "specialized purpose of the Fair Share Law—participation in the World Refugee Year in order to close out the D.P. camps of Europe—cuts against any interpretation of this enactment as a pervasive declaration of immigration policy."

discretion was to be limited to *bona fide* refugees who had not been firmly resettled. The primary concern in this regard was the liquidation of the remaining refugee camps in Europe.[17] Congress understood that

[17] The Department of State expressed concern with the limited definition of refugees by reference to the mandate of the United Nations High Commissioner on the basis that it discriminated against certain classes of refugees principally in the Middle East and Far East who had been determined as falling outside that mandate. The Department recommended amending the resolution to provide (S. Rept. No. 1651, *supra*, at 19):

> (1) that a maximum of 10,000 refugees be admitted annually with additional provisions to provide for emergency situations, and (2) that the following proposed amendment to line 2, page 2, (3) is any alien (A) who because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee from any Communist, Communist-dominated, or Communist-occupied area, or from any country within the general area of the Middle East, and who cannot return to such area or country on account of race, religion, or political opinion, or (B) who is out of his usual place of abode because of a natural calamity, military operations, or political upheaval, and who is unable or unwilling to return to his usual place of abode, and (C) who is in a country or area which is neither Communist nor Communist-dominated, and (D) who has not been firmly resettled and is in urgent need of assistance for the essentials of life.

This recommendation was rejected by both committees on the basis that "enlargement of the scope of this legislation as suggested by the Department of State will not be conducive to the achievement of the primary aim of House Joint Resolution 397, as amended, which is to contribute to the closing of the remaining displaced persons and refugee camps in Europe, such aim coinciding with the determined camp liquidation program of the United Nations High Commissioner for Refugees." H. Rep. No. 1433, *supra*, at 12; S. Rep. No. 1651, *supra*, at 18–19.

the *settlement program* of the United Nations High Commissioner was a camp liquidation effort and did not contemplate marshalling resources to relocate persons economically, socially or legally integrated into the countries of their first asylum, as here, or resettled in another country. Both committees considering the legislation made it clear that the provision was to benefit unsettled refugees (S. Rep. No. 1651, *supra*, at 26; H. Rep. No. 1433, *supra*, at 14):

> The committee believes that if enacted and wisely used, these sections of the joint resolution [(H.J. Res. 397) which evolved into the Act] will greatly contribute to the resettlement of the *diminishing residue of unsettled refugees* and permit the United Nations High Commissioner for Refugees to achieve the main purpose of the World Refugee Year, the liquidation of camps. [Emphasis added.]

That persons "firmly resettled" in the country of first asylum were not intended beneficiaries of the "resettlement opportunities" created by the Act was further indicated by the Senate Committee on the Judiciary (S. Rep. No. 1651, *supra*, at 24–25):

> In using the term "resettlement opportunities" the committee had in mind the traditional meaning of that term as developed in various enactments since the end of World War II affecting the migration of displaced persons, refugees, and refugee-escapees. The import of such term does not include persons who have been economically, socially or legally integrated in the countries of their "first asylum," but it refers solely to persons who have migrated and acquired permanent residence in countries

other than those in which they were found at the termination of hostilities or where they have sought asylum.

The term "resettlement opportunities" was thus significant to this legislation in two ways: not only did it define the type of relief Congress intended to assume a "fair share" of, but it formed the basis for determining the numerical limitation to be assumed by the United States by reference to the number of "resettlement opportunities" afforded refugees by other cooperating countries.

It was in this context that Congress took under consideration, in 1965, administration proposals to create, among other things, a permanent flexible worldwide refugee program; the result was the present statute (Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended by the Act of October 3, 1965 (79 Stat. 912–913), 8 U.S.C. 1153(a)(7)), to which we now turn.

B. THE PRESENT STATUTE RETAINS THE FIRM RESETTLEMENT CONCEPT

1. In 1965, the executive branch submitted proposals to Congress for major reform of the country's immigration law. Among other things, it sought permanent, flexible refugee legislation in lieu of the temporary, special-purpose legislation which had been enacted in the past, replacing the "Fair Share" Act then in effect.[18] The bill as passed adopted this basic

[18] Section 3 of the Administration bills (H.R. 2580 and S. 500, 89th Cong.), provided that the President could reserve up to ten percent of the new pool of a reserve quota of visas for allocation to refugees who would not come within the "Fair Share"

concept, and created the seven preference categories now contained in Section 203 of the Act. The refugee provisions of the new law maintained the basic characteristics they had when reported out of the House Subcommittee,[19] establishing a special preference category for refugees—the so-called seventh preference—in the scheme of priorities for qualifying for permanent residence in the United States. The Section does not use the term "refugee" but speaks of persons who have "fled" to escape "persecution" or "catastrophic natural calamity"; its language and history show, however, that its benefits are meant to be reserved for refugees who have not been firmly resettled elsewhere.

Testimony on behalf of the Administration proposal shows clearly that the Administration did not contemplate altering the concept of resettlement strongly rooted in the earlier legislation and administrative practices; the principle remained that an alien ceases

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Act. This provision was designed to cope with refugee emergencies. Administration spokesmen noted that refugees are uprooted persons or those who flee from persecution with no opportunity to plan for movement to a new home through normal immigration procedures and that the political interest of the United States might well make it desirable that this country take a share of these new refugees. See testimony of Abba P. Schwartz, Administrator, Bureau of Security and Consular Affairs, before Senate Subcommittee on Immigration and Naturalization in Hearings on S. 500, p. 173.

[19] The House Subcommittee rejected, most notably, the Administration's ten percent quota proposal. The Senate Judiciary Committee added several minor amendments including the addition of "catastrophic natural calamity" to the reasons for admitting refugees under the seventh preference (S. Rep. No. 748, 89th Cong., 1st Sess., 3, 16).

to be a refugee for immigration purposes once he has become firmly resettled following his flight from his homeland.[20] Although, as noted, the House Committee reacted unfavorably to certain of the Administration's proposals (p. 20, n. 19, *supra*), it nevertheless made clear its intent to enable the President to act immediately to meet refugee emergencies and to continue the country's long-standing policy of resettling refugees who were homeless. Its report stated (H. Rep. 745, 89th Cong., 1st Sess. 15):

> Legislation to enable the United States to participate in the resettlement of refugees has been part of our immigration policy continuously since the close of World War II. Permanent provision is made for the conditional entry of up to 10,200 refugees annually to continue the traditional policy of the United States to offer refuge to persons oppressed or persecuted because of their race, religion, or opposition to totalitarian beliefs. This new section of the law will permit the President to act immediately, if the situation so requires, to come to the aid of refugees as defined in this bill. The Congress, charged with the constitutional responsibility for the regulation of immigration, reserves the power to review the case history of every refugee conditionally entered into the United

[20] See testimony of Abba P. Schwartz, before Senate Subcommittee on Immigration and Naturalization in Hearings on S. 500, pp. 171–214; also testimony of George Warren, Adviser on Refugee Affairs, Department of State, before House Committee on the Judiciary, Subcommittee No. 1, in Hearings on H.R. 2580. 89th Cong., 1st Sess. 68–86.

States to determine whether the interests of this country are subject to outside pressures.

The Senate Committee on the Judiciary, in commenting upon its proposed amendment to H.R. 2580 to include the "catastrophic natural calamity" provision (p. 20, n. 19, *supra*) in Section 203(a)(7) stated (S. Rep. No. 748, 89th Cong., *supra*, at 16):

> * * * The Congress, in a prior case, granted relief to such persons through the enactment of the Refugee Relief Act of 1953, where the term "refugee" was defined as follows:
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> > Sec. 2(a) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity, or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.
>
> Refugees have been admitted to the United States through the sponsorship of voluntary agencies and private citizens. The Committee anticipates that such practice will continue so that each refugee will have an opportunity to adjust and develop in this country without fear of abandonment and without the possibility of becoming a public charge.
>
> The conditional entry of refugees as proposed in this bill is not unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended

that the procedure remain the same. * * * [21]

2. The foregoing legislative history indicates that in 1965 Congress intended to change the existing statutory expression of our refugee policy in three basic ways: (1) to permit the United States to make its determination as to who is a refugee, rather than accept the determination made by the United Nations High Commissioner for Refugees; (2) to extend the definition of "refugee" to include persons who may become victims of a natural calamity; and (3) to eliminate the use of the word "parole" when allowing refugees to enter the United States because that word has a connotation unfavorable to the alien.

At the same time, there was no Congressional intent to depart from established policies and procedures for the settlement of refugees. Although the legislation that emerged did not use the word "refugee" or the phrase "firm resettlement", there is no indication

[21] A similar statement of views is contained in the House Report (H. Rep. No. 745, *supra*, at 15):

> The conditional entry of refugees as proposed in this bill is not unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same. Since the use of the term "parole" conveys a connotation unfavorable to the alien, the substitute term "conditional entry" has been used to avoid any such implication. The so-called Fair Share Refugee Act (the act of July 14, 1960), with the exception of the sections which permit adjustment of status of refugees already admitted to the United States under its provisions, is repealed. The repeal of this legislation will again permit the United States to determine who is or who is not a refugee.

in the legislative history that Congress intended to retreat from its established policy of not accepting as refugees persons who fled their homeland but who have become firmly resettled in another country; indeed, the history points the other way.[22]

The consistent administrative interpretation has been that Section 203(a)(7) and its predecessors have not covered any alien who has firmly resettled in another country (see cases cited *supra*, p. 7, n. 4). The administrative view, "in cases of doubtful meaning, is accepted unless there are cogent and persuasive reasons for rejecting it." *United States* v. *Shreveport Grain and Elevator Co.*, 287 U.S. 77, 84. See also, *Chemical Bank New York Trust Co.* v. *Steamship Westhampton*, 358 F. 2d 574, 586–587 (C.A. 4), certiorari denied, 385 U.S. 921. There is no reason for rejecting that view here—particularly where Congress has been continuously aware of the practice of giving decisive importance to the concept of resettlement.[23]

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[22] See debate in the Senate, 111 Cong. Rec. 24225–24241, 24440–24444, 24446–24498, 24500–24504, 24544, 24557, 24738–24739, 24745–24785.

[23] In addition to the published administrative decisions already cited, periodic reports have been submitted by the Immigration Service to Congress which note the number of such actions taken in a particular period of time. See remarks of Congressman Feighan, 113 Cong. Rec. 22787–22788, which read into the record a report setting forth statistics on the operation of Section 203(a)(7) for the six-month period ending June 30, 1967. The report shows that 53 applications were rejected during that period under "established screening procedures" because the aliens were "firmly settled."

As this Court said in *Udall* v. *Tallman*, 380 U.S. 1, 16:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable, one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon*, 329 U.S. 142, 153. See also, *e.g.*, *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. * * *

The administrative practice is particularly entitled to weight when, as here, it is based upon a complex statutory scheme whose antecedents plainly justify the practice.

3. Of course, refugee legislation reflects primarily a humanitarian concern for uprooted persons. In considering the distribution of 14,556 visas under earlier proposed legislation, the Senate Judiciary Committee expressed its intention that it "be made in a fair and equitable manner without any prescribed numerical limitations for any particular group, according to the show-

ing of hardship, persecution, and the welfare of the United States." [24] During the discussion on the floor of the House the intent was expresed "that those who administer this program give primary consideration, in granting these visas, to bona fide refugees from Communist—or other persecution, who have special abilities, training or skills which will make them of maximum value to the United States of America." [25] These statements crystallize the basic refugee policy that the need to help in resettling the world's homeless takes precedence over other general immigration policies. Viewed against the background we have detailed, the court of appeals' decision would virtually nullify this congressional policy of resettlement of *bona fide* refugees in emergency circumstances.[26]

4. The court of appeals noted that Section 203(a)(7) prohibits an alien from applying for conditional entry from a country of which he is a "national",

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[24] S. Rep. 1057, 85th Cong., 1st Sess., p. 6 (1957).

[25] Representative Judd from Minnesota, 103 Cong. Rec. 16304-16305.

[26] This legislative history further shows the error of the district court's rationale in this case—that the actual fact of firm resettlement is vitiated by the retention by the former refugee of an alleged subjective intent and desire to eventually settle, if possible, in the United States (295 F. Supp. at 1372) (A. 43). Congress' concern under the refugee provisions ends at the time the refugee, in objective fact, has been economically, socially or legally integrated in the country of first asylum. No doubt many of the refugees involved under previous legislation harbored the desire, if possible, eventually to come to the United States. This, however, was not the basis of this remedial refugee legislation aimed at unsettled refugees in emergent circumstances.

and drew from that fact an inference that Congress intended only this limitation, to the exclusion of any disqualification of resettled refugees (419 F. 2d at 254; A. 41). But the statutory language does not require any such inference, and the inference totally overlooks the legislative history we have discussed, assuming without justification that the limitations on "nationals" (which first appeared in the 1960 Act) was intended as a striking departure from previous policies on the treatment of refugees. This interpretation was considered and squarely rejected by the Second Circuit in *Shen* v. *Esperdy, supra.* As there pointed out (428 F. 2d at 297–299), the reference to "nationals" was limited to seven countries in Western Europe; it is inapplicable where, as in the instant case, the applicant is applying in this country under the proviso designed to enable aliens temporarily in this country who are eligible for the refugee preference to acquire adjustment of status to permanent residence. See *Tai Mui* v. *Esperdy,* 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017.

The more logical interpretation—and that suggested in *Shen, supra*—is that Congress was merely reflecting the primary concern of international organizations, which focused on refugees outside their country of nationality, during the period when it was enacting temporary legislation to assist in those international activities. It is likely that Congress considered that the displaced persons situation had so abated because of past resettlement programs and the rapid economic recovery of Western Europe

that no provision was necessary for nationals of non-communist countries who fled from permanent residence in a Communist country, such as East Germany, to the country of their nationality, even though a period would be required for firm settlement." Moreover, the 1960 statute provided relief to refugees from the Middle East. Thus, for example, the limitation on applications by "nationals" avoids unilateral assumption by this country of the vast Palestinian refugee problem in Jordan arising out of the creation of the State of Israel; although residing in camps in the country of their nationality, many of these refugees are not to this date "firmly resettled." It appears therefore that the nationality limitation was not meant as a congressional device to eliminate the "firmly resettled" principle, but to deal with other problems. Indeed, to adopt the approach below would permit a refugee who has acquired "nationality" in the country of his initial refuge to proceed to another country of which he is not a "national" to make application for entry

[37] In fact, it was not contemplated that a refugee who could go to the country of his nationality in the free world without fear of persecution would be granted entry into the United States under the 1965 Act, even though he was still in flight and was in a country other than his nationality. For example, a French Algerian fleeing to Italy would not have been eligible to come to the United States since he could proceed without fear of persecution to France, the country of his nationality. See Testimony of Mr. George Warren, Adviser on Refugee Affairs, Department of State, in the Hearings on H.R. 2580, *supra*, 89th Cong., 1st Sess. 69–70.

to this country. Congress could not have intended this absurd result.

In any event, Congress surely could not have intended to permit millions of refugees excluded under prior programs as firmly resettled to qualify now under the small quota of Section 203(a)(7), thereby displacing homeless refugees. As the Second Circuit put the matter in *Shen, supra,* 428 F. 2d at 302, "the flexibility afforded to the Executive in admitting refugees suffering from comparatively recent crises—whether political or natural—would be all but destroyed if [the countervailing view] were accepted * * * [T]he 10,200 entries or visas per year afforded under section 203(a)(7) could be quickly exhausted by aliens who have found relief by resettlement in new homes but who nevertheless still wish to immigrate to the United States. * * * [I]f this were allowed to happen 'the real refugee, the homeless, will go wanting.' " There is nothing in the statutory language that requires a result so contrary to the legislative intent.

CONCLUSION

The background and immediate history of Section 203(a)(7) shows that it was intended for refugees in emergent situations. A former refugee who is "firmly resettled" in another country is no longer a refugee. There is accordingly no reason to place him within the small quota entitled to benefits under Section 203(a)(7).

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded with directions that the order of the Regional Commissioner be reinstated.

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DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Textbook

IN THE

Supreme Court of the United States

October Term, 1970
No. 156

GEORGE K. ROSENBERG, DISTRICT DIRECTOR,
Petitioner,

vs.

YEE CHIEN WOO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

Statement.

The statement as set forth in the Petitioner's brief is a correct recitation of the facts involved in this case and the proceedings from the time of filing the application under Section 203 (a) (7) of the Act seeking classification as a refugee through the decision of the Court of Appeals for the Ninth Circuit.

ARGUMENT.

I.

Respondent Clearly Qualified for Refugee Classification Under Section 203 (a) 7 of the Immigration and Nationality Act.

Section 203 of the Immigration and Nationality Act of 1952, as added, 79 Stat. 912, 8 U.S.C. (Supp. V) 1153, provides in pertinent part:

> (a) Aliens who are subject to the numerical limitations specified in Section 201 (a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> * * *
>
> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201 (a) (ii), to aliens who satisfy an Immigration and Naturalization Service Officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their

usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, that Immigrant visas in a number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

The facts show that Respondent fled from China after the communist conquest of that country. They further show he reasonably fears to return to China, because as a former businessman in Shanghai whose business was expropriated by that regime, he would be persecuted as a capitalist, and as an opponent of that regime. As the District Court stated:[1]

"The uncontroverted facts are that plaintiff was a businessman, a capitalist, prior to the communist takeover. Shortly after the communists came to power most businessmen were purged and many executed. In 1952 plaintiff was arrested and interrogated for fourteen days. Only after revealing his financial holdings was he released. His business was subsequently confiscated by the State. Plaintiff left Communist China in 1953, penniless. He was allowed to leave only on the condition that he return. This, of course, he did not do.

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[1] *Woo v. Rosenberg*, 295 Fed. Supp. 1370 at 1372. [A-41-42].

> Therefore, either as a capitalist, an anti-communist, a Catholic, or a 'lawbreaker', plaintiff has good reason to fear persecution at the hands of the communists. While he did not convert to Catholicism until 1962, and at the time of his escape was not yet a 'lawbreaker', he was a capitalist and an anticommunist. This brings plaintiff within the requirements of section 203(a)(7)."

There is no contention Respondent is a national of his intermediate residence, Hong Kong, from whence he came to the United States. There is no dispute Respondent continuously resided in the United States over two years before he applied for adjustment of status. He has met all the requirements of the statute *as written* and his eligibility *thereunder as written* cannot, and, indeed, is not, disputed. A question only arises when the administratively-legislated additional requirement "be not firmly resettled" is considered. Petitioner concedes it has applied this requirement to all refugees seeking relief under this Act despite the absence of such language in the Statute. Nevertheless, the District Court found Respondent was not barred even by this standard, stating.[2]

> "Without expressing any opinion as to why Congress chose to omit the 'firmly resettled' provision in the amendments to the Refugee Relief Act of 1953, this court finds that plaintiff was never 'firmly resettled' and still qualifies as a refugee under the terms of Section 203 (a) (7). Accordingly, the District Director erred in denying plaintiff's application."

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[2]*Ibid.* A-44.

On appeal, the Court of Appeals for the 9th Circuit affirmed, but stated:[3]

> "Whether appellee was firmly resettled in Hong Kong is not, then, relevant. What is relevant is that he is not a national of Hong Kong (or the United Kingdom); that he is a national of no country but Communist China and as a refugee from that country remains stateless."

II.

The Clear, Plain Unambiguous Language of Section 203 (a) (7) of the Immigration and Nationality Act, Obviates Examination of the Legislative History of This or Prior Refugee Acts.

Petitioner has attempted to read into Section 203 (a) (7) the term "firmly resettled," and bases its entire argument on two specific acts, enacted 22 years and 17 years ago respectively, regarding the refugee problems after World War II. The first was the Displaced Persons Act of 1948, 62 Stat. 1009 (June 25, 1948), where Congress excluded those who, after fleeing from their home countries, had been received for "permanent residence" elsewhere. The act required as a condition precedent for entry into the United States, that the refugee not be "firmly resettled."

The next statute was the Refugee Relief Act of 1953, 67 Stat. 400 (Aug. 7, 1953), which permitted the admittance of 214,000 refugees within a three and one-half year period. Congress included as a condition precedent proof that the refugee was "not firmly resettled" elsewhere.

Petitioner concedes the statutes dealing with the refugees after 1953 make no mention of the term "firm

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[3] *Woo v. Rosenberg*, 419 F. 2d 252. [A-49].

resettlement." In the Refugee Act of Sept. 11, 1957 (71 Stat. 639), the phrase "not a national" was substituted.

This substituted language was repeated in the Fair Share Refugee Act of July 14, 1960 (74 Stat. 504, 505), and, also, in the Refugee Assistance Act of June 2, 1962 (76 Stat. 121).

It is difficult, therefore, to understand how the Petitioner can argue from this obvious change in statutory language that the present statute retains the "firm resettlement" concept. Congress has omitted the words "firmly resettled" and inserted the phrase "not a national" into Section 203 (a) (7). Congressional intent is crystal clear regarding Section 203 (a) (7). Looking into prior Congressional intent is not necessary because it is evident that Congress thus departed from its earlier rule requiring that a refugee not be "firmly resettled." What better proof could be provided than the fact that prior to the enactment of Section 203 (a) (7), three preceding refugee acts did not contain the term "firmly resettled"? There is, therefore, no need to resort to the legislative history of Section 203 (a) (7).

In *Hamilton v. Rathbone*, 175 U.S. 14 (1899), this Court said at page 421 referring to the then long-established limit on judicial construction of statutes:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create an ambiguity. If Section 728 were an original act, there would be no room for construction. It is

only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. The word 'property,' used in section 728, includes every right and interest which a person has in lands and chattels, and is broad enough to include everything which one person can own and transfer to another. The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."

To the same effect in construing the White Slave Traffic Act of 1910, this Court said in *Caminetti v. United States,* 242 U.S. 470 (1917), at page 490:

"Reports in Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation, *Blake v. National Banks,* 23 Wall. 307, 319; *Bate Refrigerating Co. v. Sulzberger,* 157 U.S. 1, 42; *Chesapeake and Potomac Telephone Co. v. Manning,* 186 U.S. 238, 246; *Binns v. United States,* 194 U.S. 486, 495. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken

as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie v. Hare*, 239 U.S. 299, 308."

Again in *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, at page 101, this Court stated on the subject:

"To say that the passenger had not been brought to the United States unless the intent was to leave him here, is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction. *United States v. Wiltberger*, 5 Wheat. 76, 95, 96; *Hamilton v. Rathbone*, 175 U.S. 414, 419, 421; *United States v. Hartwell*, 6 Wall 385, 396; *Crooks v. Harrelson*, 282 U.S. 55, 59-60.

It is argued that the statute is highly penal in character and should therefore be construed strictly. But the object of all construction, whether of penal or other statutes, is to ascertain the legislative intent; and in penal statutes, as in those of a different character, 'if the language be clear, it is conclusive.' *United States v. Hartwell*, supra, pp. 395-396; *United States v. Corbett*, 215 U.S. 233, 242; *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329-330."

To the same effect, this court said regarding statutory construction in *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485, at Page 492:

> "We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent proposals which failed to become law."

And in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341, U.S. 384 (1950) at Page 396, Mr. Justice Douglas speaking for the majority said:

> "It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.
>
> Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the

lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

By and large, I think our function was well stated by Mr. Justice Holmes: 'We do not inquire what the legislature meant; we ask only what the statute means.' Holmes, Collected Legal Papers, 207. See also *Soon Hing v. Crowley*, 113 U.S. 703, 710-711. And I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us."

And in *United States v. Public Utilities Commission of Calfiornia*, 345 U.S. 295 (1953) at page 319, Mr. Justice Jackson, concurring, warned of the hazard of the psychoanalytical method of statutory construction in saying:

"I should concur in this result more readily if the Court could reach it by analysis of the Statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute."

III.

The Legislative History of Section 203 (a) (7) Does Not Support Petitioner's Contention That a Refugee Must "Not Be Firmly Resettled" to Be Eligible Under Section 203 (a) (7).

In the guise of seeking enlightenment regarding Congressional intent to be gleaned from Legislative History concerning a refugee's resettlement in an intermediate country, Petitioner devotes one-third of his brief to the Legislative History not of the instant statute, but of four prior Refugee Statutes (See Petitioner's Brief pp. 8-19). Respondent concedes that the Displaced Persons Act of 1948 (62 Stat. 1009) and the Refugee Relief Act of 1953 (67 Stat. 400) contained the requirement, *in haec verba,* that eligibility under those statutes required that the refugee not be firmly resettled. But there is no escape from the fact that the Refugee Act of 1957 (71 Stat. 643) omitted the words "not firmly resettled" and substituted instead the "*not a national*" limitation, the *same language found in Section 203 (a) (7) of the instant statute.*

Again in the Act of July 14, 1960, (74 Stat. 504-5), in the so-called "Fair Share" Refugee Act, Congress repeated this definition of refugee, and again omitted "not firmly resettled" as a requirement.

Also on June 28, 1962, Congress passed the Immigration and Refugee Assistance Act (76 Stat. 121) without the "not firmly resettled" language.

It is noteworthy that the Department of State recommended certain changes in the language of the "Fair Share" Refugee Act, specifically, to provide for (1) an annual admission of 10,000 refugees; (2) additional provisions for emergency situations; (3) a def-

inition of Refugee limited to those who had "not been firmly resettled." All of these recommendations were rejected by both House and Senate Committees (see p. 17 of Petitioner's Brief, footnote 17).

Senator Theodore Kennedy of Massachusetts, Chairman of the Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, of the United States Senate, who presided over months of hearings on the Senate bill, explained the refugee portion thereof on September 17, 1965:[4]

> "As defined in this bill; refugees are those persons displaced from Communist dominated countries or areas or from any country in the defined area of the Middle East because of persecution, or fear of persecution, on account of race, religion or political opinion. *They must be currently settled in countries other than their* homelands." (italics supplied).

At least Senator Kennedy realized, if the Petitioner has not, that settlement in an intermediate country is a common course in the displacement of the refugee from his homeland. It is contended that Congress, as well, so comprehended and substituted "not a national" in the last three refugee statutes, including Section 203 (a)(7) of this Statute.

Thousands of pages of testimony preceding the 1965 amendments to the Immigration & Nationality Act of 1952 shed little light on the minuscule refugee portion of the statute which was finally enacted. (The main feature of the Bill, of course, was the abolition of the National Origin Quota System of selection of immigrants).

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[4]Congressional Record, p. 24227, Sept. 17, 1965.

Efforts to ascertain Congress' intent by reading the legislative history of this Act point to the morass into which one falls in this approach. It is not without reason this court has stated repeatedly, where statutory language is plain, resort to the history is unwarranted.

Hamilton v. Rathbone, supra;
Caminetti v. United States, supra;
Packard Motor Co. v. National Labor Relations Board, supra;
Schwegmann Bros. v. Calvert Corp., supra.

IV.

Congress Provided for a Reasonable Classification in Section 203 (a) (7) Disqualifying "Nationals", Rather Than Those "Firmly Resettled."

Nationality is an important status. It is distinguished everywhere, in all countries, from the inferior status of mere alien residents, or even permanent residents. For example, it is elementary that the right to vote and hold public office is almost everywhere restricted to citizens or nationals. Employment opportunities are sharply limited to citizens in many professions, and countless occupations. In California our Business & Professions Code excludes aliens from such employment as attorneys, surveyors, brokers, private detectives, and social workers. A United States Military Officer must be a United States Citizen. Aliens can be deported for countless reasons by the nation in which he resides. In the United States it has been estimated that there are 700 grounds for deportation. Nations do not, however, deport their own citizens. Aliens almost universal-

ly must register as such and maintain their status by regular renewal of registration (See Section 263, 5, 6, of I. & N. Act 1952 as amended (8 U.S.C. 3, 4, 5, 6).[5]

The Hong Kong authorities gave Respondent Woo a Certificate of Identity. That document is what its name implies. It identifies him as a resident of Hong Kong. This status is vastly distinguishable from that of a British Citizen or national. It is only this latter group Congress intended to exclude from Section 203(a)(7) eligibility, and for the good and sufficient distinction between *alien residents* and *citizens*, and the formers' disabilities and inferiority contrasted with the latters' rights and privileges.

V.

In 1968 the United States Entered Into a Treaty on Refugees Which Defines Refugee Like 203 (a) (7) Excluding, Only Those "Not Nationals."

The Protocol to the Convention Relating to the Status of Refugees has been acceded to by 27 countries including the United States on November 1, 1968. That Protocol defines refugee as:

> "A refugee within the meaning of the Protocol is defined in the same manner as one under the 1951 Convention except that the cut-off date in the Convention is eliminated. He is a person who:
>
> ". . . owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear,

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[5]Immigration Law & Procedure, Gordon & Rosenfeld, Volume 1, p. 4-6, ¶4.16.

is unwilling to avail himself of the protection of that country; or who, *not having a nationality* and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." (Italics supplied).

His refugee status will cease to exist when the refugee:

"(1) . . . has voluntarily reavailed himself of the protection of the country of his nationality; or

(2) having lost his nationality, he has voluntarily reacquired it; or

(3) *he has acquired a new nationality, and enjoys the protection of the country of his new nationality;* or (Italics supplied)

(4) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee

have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

It will not cover any person if:

"(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

Under this Treaty as well as Sec. 203 (a) (7) only nationals of the intermediate countries are barred, not those who might have become firmly resettled. If a conflict should arise between 203 (a) (7) and the later treaty, a different case would be presented to this court. No such conflict has arisen under this case. Respondent qualifies under both. This late expression in the form of a treaty, signed by the United States is a reaffirmation of the language in 203 (a) (7).

VI.

The Decision of the Court of Appeals for the Second Circuit in Shen v. Esperdy, 428 F. 2d 293 (1970) Can Be Distinguished From the Instant Case.

Shen had Chinese Nationality, a Chinese Passport, and resided in the only China the United States recognizes diplomatically, *i.e.* The Republic of China. Shen had full rights of nationality. He would plainly not qualify under 203 (a) (7) (iii) were he now applying at the Hong Kong Office opened by the Immigration and Naturalization Service in November of 1970 to accept such applications, as he is a *national* of a country in that area. The *Shen* decision is in error in failing to see this distinction, where it concluded:

> "The Broadest scope which the 'not a national' language can be afforded is that it merely states that applicants for conditional entries cannot be nationals of one of these seven nations within which they have applied. Thus we view the language of Section 203 (a) (7) (A) iii as relevant only to those aliens who apply for conditional entries in one of these seven countries." *Shen v. Esperdy*, 428 F. 2d 293 (1970).

Section 203 (a) (7) says applicants must not be nationals "of the countries *or areas* . . ." in which their applications are made (italics supplied). The Shen Court ignored the words "or areas," in interpreting the limitation on conditional entry applicants. Further, the language in Section 203 (a) (7) granting immigrant visas in lieu of conditional entries to residents of the

United States of two years, limits this relief to "such aliens," thereby compelling the conclusion that the same requirements of 203 (a) (7) applicable to outside-the-United States applicants, also apply to inside-the-United States applicants. Analysis of the footnote on page 298 of that decision 428 Fed. 293 (1970) shows the Second Circuit itself reached an incorrect conclusion, indeed, while at the same time accusing the Ninth Circuit Court of Appeals of making an absurd analysis.[6]

The Second Circuit clearly ignored the plain language of Section 203 (a) (7)(A) that refugee eligibility was limited to those who were Not Nationals of countries in the areas where applications were made. The court's extravagent statement:

> "We do not believe Congress ever meant that once someone has been a refugee he remains one for the rest of his life regardless of intervening events."[7]

only proves the Court of Appeals in Shen failed to read the Statute the way Congress wrote it. The Court of

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[6]"The absurdity of applying the 'not a national' language to aliens applying under the proviso is demonstrated by the fact that the requirement would always be satisfied by an alien who had overstayed his temporary admission to the United States. The Ninth Circuit interpreted the Act to say, in effect, 'not a national of the intermediate host country to which he has fled from his home country.' See 419 F.2d at 254. However, here the language of the Act is quite clear; section 203(a) (7) (A) (iii) states 'not nationals of the countries or areas in which their application for conditional entry is made.' Even if one could properly construe this language as applicable to applicants under the proviso, it would dictate merely that the alien could not be eligible if he was a national of the United States, the country in which his application was made."

[7]*Shen v. Esperdy, supra* at p. 302.

Appeals for the Ninth Circuit on the other hand correctly stated in its decision here appealed from:

> "In any event we cannot disregard the clear manifestation of congressional intent shown by the substitution, in 1957, of the status, 'not a national' for that of 'not firmly resettled' as formerly specified in the 1953 Act. Nothing in the legislative history advanced by appellant persuades us that Congress intended this substituted language to mean anything but what it clearly says."[8]

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully urged that the decision of the Court below be affirmed.

GORDON G. DALE,
Attorney for Respondent.

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[8]*Woo v. Rosenberg, supra* A-49.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 156

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, PETITIONER

v.

YEE CHIEN WOO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent takes issue with our conclusion, rested on careful examination of the legislative history, that Congress intended the absence of "firm resettlement" in another country to be an essential prerequisite to the invocation of the refugee benefits of Section 203 (a)(7) of the Immigration and Nationality Act; he also appears to raise a new issue—not dealt with in our opening brief because not reached by the court below—as to whether he had, in fact, been firmly settled in Hong Kong before coming to this country. These contentions warrant brief response.

414-314—71

I

Much of petitioner's argument rests upon an erroneous reading of legislative language. Contrary to his assertion (Resp. Br. 6, 11, 12),[1] the "not a national" phrase did *not* appear in the Refugee Act of 1957 (71 Stat. 639). It first appeared in the "Fair Share" Act of 1960.[2]

The fact that no mention of "firm resettlement" appeared in the 1957 Act is wholly understandable since it would have been entirely superfluous there, given the special purpose of that enactment. As the Second Circuit pointed out in *Shen* v. *Esperdy*, 428 F. 2d 293, 299, the 1957 Act was a temporary statute, primarily enacted for the limited purpose of liquidating the "pipeline" cases remaining at the expiration of the Refugee Relief Act of 1953. That the 1957 Act

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[1] The court below similarly misread statutory language. See 419 F. 2d at 254.

[2] Respondent is also in error in contending that the "not a national" language appeared in the Migration and Refugee Assistance Act of 1962 (76 Stat. 121) which, in any event, has no bearing on this case. The major purpose of this legislation was to provide asistance and appropriate funds for and on behalf of refugees. Apart from extending the Fair Share Act, the only possible relevance of that statute was its provision for assistance and funds for refugees fleeing persecution in the Western Hemisphere—mainly those escaping from Cuba (see H. Rep. 1066, 87th Cong., 1st Sess. p. 16; S. Rep. 989, 87th Cong., 1st Sess. p. 1). This statute had nothing to do with immigration eligibility or status; and in these circumstances, it would have been pointless for that Act to have prescribed "firm resettlement."

In order to eliminate any misunderstanding, we have set forth the relevant language of the various statutes having any conceivable bearing on the case in the Appendix, *infra* pp. 11–14, except for the 1965 Act which we have set forth in our opening brief pp. 2–3.

was not intended to alter previous criteria regarding "firm resettlement" is shown by the House Committee Report (H. Rep. 1199, 85th Cong., 1st Sess., pp. 2, 3, 13)[3] which stated that the 18,656 visas remaining under the Refugee Relief Act were being made available for "the category of immigrants for whom they were originally intended." As our opening brief points out (Pet. Br. p. 14 n. 14), the State Department, in a contemporaneous interpretation of this statutory purpose, immediately adopted regulations setting forth the "firmly resettled" criterion in implementing the 1957 Act.

As for the "Fair Share" Act of 1960, we have fully canvassed in our opening brief its special history, reflecting this country's participation in the effort of the United Nations to close remaining displaced persons camps in Europe (Pet. Br. 14–19). In essence, the United States under this statute undertook to accept for resettlement in this country its fair share of refugees under the mandate of the United Nations High Commissioner for Refugees (hereafter UNHCR). It is enough to note here that in this setting it seems likely that the statute's provision that an applicant seeking its benefits could not be a national of the country in which he applied was simply patterned after the mandate of UNHCR from which

[3] It is also possible that the absence of any reference to "firm resettlement" in the 1957 Act was simply a matter of verbal considerations. The 1957 Act combined "refugee" and "escapee" concepts in a single subsection, while the "firmly resettled" condition had appeared in the Refugee Relief Act of 1953 only in relation to the refugee aspect. See Appendix A, *infra* pp. 12, 13.

the legislation stemmed (see S. Rep. 1651, 86th Cong., 2d Sess., p. 23). Section 6 of the UNHCR statute specified that the mandate would apply only to one who "is outside the country of his nationality." [4] It may also be significant that Section 7(b) of the UNHCR statute specified that the High Commissioner's mandate did not extend to a person

> Who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

This latter provision could be regarded as a substantial adoption of the firm resettlement concept. The underlying premise of the "Fair Share" Act, that each nation should be responsible for the care of its own refugees even if they had originally come as refugees from other areas. Viewed in the total context, this premise did not necessarily exclude the firm resettlement concept.

II

The respondent seeks to find support for his construction of Section 203(a)(7) of the 1965 Act itself—the precise legislative provision involved in the present suit—in a statement made during Senate debate and in a 1968 United Nations Convention relating to refugees. Analysis shows that neither supports his case.

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[4] Annex to United Nations General Assembly Resolution 428 (V), December 14, 1950. The official text of the UNHCR statute is set forth in United Nations Resolutions Relating to the Office of the United Nations High Commissioner for Refugees (2d ed.) HCR/INF/48/Rev. 1. A portion of its text is set forth in S. Rep. 1651, 86th Cong., 2d Sess., p. 23.

1. As we have detailed in our opening brief (Pet. Br. 19–26), the legislative history of Section 203(a)(7) contains many statements that its aim was to give the Executive flexible means to aid "the homeless and oppressed."[8] The only support respondent has mustered for the proposition that Congress nevertheless meant to open its benefits to aliens firmly settled elsewhere is a statement made by Senator Edward M. Kennedy, the Committee spokesman, in the floor debate on the 1965 Act, that the refugees benefited by the bill "must be currently settled in countries other than their homelands." 111 Cong. Rec. 24227. It is our submission that to read this observation as rejecting the firmly resettled concept, is not only to reject all other indicia of congressional intent but also to take the comment out of its immediate context. The remarks referred to were part of a long exposition on the Senate floor of many provisions of the bill, of which Section 203(a)(7) was only a small part. Senator Kennedy's use of the word "settled"—which does not appear in the statute or the Committee Reports—appears to have been simply a paraphrase of the statutory directive ultimately adopted, excluding nationals of the country or area in which the application was made. Examination of his statement in its entirety reveals that the Senator was urging the need to provide sanctuary for homeless persons. Indeed, shortly after uttering this sentence, Senator Kennedy spoke

[8] This comment was made by Senator Hart, the principal author of the 1963 and 1965 Senate versions of the Administration Bill. See S. 1932, 88th Cong., 1st Sess.; S. 500, 89th Cong., 1st Sess.; 111 Cong. Rec. 24239.

(in relation to the natural calamity provision) of assuring "that we will remain a haven for the displaced," and that "the cases of the greatest need can be processed at once." Moreover, in the course of a subsequent colloquy with Senator Kuchel, during the floor debate, Senator Kennedy commented that the bill "establishes quite clearly what we mean by refugees—*those fleeing* from Communist domination, from the effects of natural calamity, or from the defined areas in the Middle East." 111 Cong. Rec. 24230 (emphasis added). These observations hardly are consistent with respondent's interpretation; on the contrary, Senator Kennedy's reference to "those fleeing" is consistent with the statutory protection of those who "have fled" persecution.

2. On July 28, 1951, a Convention Relating to the Status of Refugees was adopted by the United Nations.[6] The Convention was not, however, intended to deal with immigration, or to bind any signatory to receive refugees. It related only to the status of refugees outside the country of their nationality after they had been received in another country, and sought to assure them various political, economic and civil rights there. The United States never became a signatory, apparently because it deemed the status of refugees abundantly protected in this country.

Since the Convention related only to those who had refugee status before 1951, it had only limited utility.

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[6] The full text of the Convention is set forth as an Annex to TIAS 6577, 19 U.S. Treaties 6259. It will be noted that the terminology and definitions of the Convention closely resemble those in the contemporaneous UNHCR statute (see note 4 *supra*, and relating text).

In 1967 the United Nations decided to give the Convention current vitality; accordingly, on January 31, 1967, it adopted a Protocol Relating to the Status of Refugees. The Protocol merely noted that new refugee situations had developed since the adoption of the Convention and undertook to apply the Convention to all refugees. This Protocol was presented to the United States Senate and was quickly ratified, becoming effective as to the United States November 1, 1968, upon proclamation of the President. TIAS 6577, 19 U.S. Treaties 6259. Although the 1951 Convention was thus adopted by the Protocol, it continued to be concerned not with the acceptance of refugees but with their political, economic and civil rights once asylum has been given. In short, the Protocol in no way relates to the rights of aliens temporarily in this country who might seek to obtain adjustment of status; nor is there any reason submitted why it aids respondent's interpretation of Section 203(a)(7).[7]

3. Respondent also seeks to distinguish the recent Second Circuit decision in *Shen* v. *Esperdy*, 428 F. 2d

[7] In transmitting the Protocol to the Senate, and urging its ratification, President Johnson stated that: "Accession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." Executive K, 90th Cong., 2d Sess. A similar comment was made in the favorable report of the Senate Foreign Relations Committee. S. Exec. Rep. 14, 90th Cong., 2d Sess., p. 2. The Senate Committee Report also incorporated the testimony of Laurence Dawson, a State Department official. Mr. Dawson testified that the measure would add little to the protection refugees already enjoyed under our laws (p. 4), that there would be no conflict with our immigration laws (p. 8), and that "there is nothing in this protocol which implies or puts any pressure on any contracting state to accept additional refugees as immigrants" (p. 10).

293 (Res. Br. 17–19) on the ground that Shen had Chinese nationality; accordingly, it is argued, Shen was a national in the "area" where his application could have been made and would, in any event, not have qualified for Section 203(a)(7) relief had he applied for relief in Hong Kong. The logic of this argument would, however, also disqualify respondent since as a resident of Hong Kong and as a national of China he was also a national in the "area" where his application could have been made. The truth of the matter is that respondent and Shen are in precisely the same position since neither applied for benefits outside the United States; thus neither was in the only situation in which the "not a national" provision can have any meaning.[8] The Second Circuit observed in *Shen* that to apply the "not a national" language to aliens applying in this country would be an "absurdity" since "the requirement would always be satisfied by an alien who had overstayed his temporary admission to the United States"; even if ap-

[8] It will be recalled that the instant application relies upon the proviso to Section 203(a)(7), which is designed to enable aliens temporarily in this country who are eligible for the refugee preference to acquire adjustment of status to permanent residence. They are entitled to an annual allotment of 5,100.

Opening this allotment to those who, like respondent, came to the United States as visitors from countries where they have stable homes would substantially reduce the opportunities available to those who are bona fide refugees and encourage evasion by those who gain entrance as visitors. As Senator Kennedy pointed out in Senate debate: "In any given year, one-half of these numbers may be used to adjust the status of previously paroled refugees who can qualify as permanent resident aliens." 111 Cong. Rec. 24227.

plicable, it would add nothing since "it would dictate merely that the alien could not be eligible if he was a national of the United States, the country in which his application was made" 428 F. 2d at 298, n. 6.

III

The district court found that respondent had not been firmly resettled in Hong Kong, and accordingly deemed it unnecessary to rule whether firm resettlement would have barred his application (App. 43–44; 295 F. Supp. 1370, 1372). On appeal, petitioner challenged the determination that respondent was eligible for relief under Section 203(a)(7); since the court of appeals held firm resettlement no bar, it did not review the district court's findings as to resettlement (App. 49; 419 F. 2d 252, 254). In our opening brief we proceeded on the assumption that the only issue before the Court was whether firm resettlement bars relief under Section 203(a)(7).

In quoting the district court's holding (Res. Br. 4), respondent may be requesting that this Court pass upon the propriety of that holding. If the district court's ruling becomes relevant to this Court's decision, we urge that respondent's seven-year residence in Hong Kong, his establishment of a stable home, family, and business, and the substantial rights and privileges accorded him, including the opportunity to visit foreign countries, sufficiently show that he was firmly resettled in Hong Kong. The result would have been different, of course, if respondent's stay in Hong Kong had been transitory, tenuous, or unstable. In

our view, respondent's intention to immigrate to the United States if the opportunity arose, shared with millions of other prospective immigrants, is not inconsistent with the stable residence in Hong Kong demonstrated by this record.

CONCLUSION

For the reasons stated herein and in our opening brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the case remanded with directions that the order of the Regional Commissioner be reinstated.

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JANUARY 1971.

APPENDIX

Relevant Provisions of Prior Laws

1. *Section 2(c), Displaced Persons Act of June 25, 1948, 62 Stat. 1009.*[1]

(c) "Eligible displaced person" means a displaced person as defined in subsection (b) above, (1) who on or after September 1, 1939, and on or before December 22, 1945, entered Germany, Austria, or Italy and who on January 1, 1948, was in Italy or the American sector, the British sector, or the French sector of either Berlin or Vienna or the American zone, the British zone, or the French zone of either Germany or Austria; or a person who, having resided in Germany or Austria, was a victim of persecution by the Nazi government and was detained in, or was obliged to flee from such persecution and was subsequently returned to, one of these countries as a result of enemy action, or of war circumstances, and on January 1, 1948, had not been firmly resettled therein, and (2) who is qualified under the immigration laws of the United States for admission into the United States for permanent residence, and (3) for whom assurances in accordance with the regulations of the Commission have been given that such person, if admitted into the United States, will be suitably employed without displacing some other person from employment and that such person, and the members of such person's family who shall accompany such person and who propose to live with such person, shall not become public charges and

[1] Similar provisions appear in the amendment of this statute on June 16, 1950, 64 Stat. 219.

will have safe and sanitary housing without displacing some other person from such housing. The spouse and unmarried dependent child or children under twenty-one years of age of such an eligible displaced person shall, if otherwise qualified for admission into the United States for permanent residence, also be deemed eligible displaced persons.

2. *Section 2, Refugee Relief Act of August 7, 1953, 67 Stat. 400, in pertinent part.*

SEC. 2. (a) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural clamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.

(b) "Escapee" means any refugee who, because of persecution or fear of persecution on account of race, religion, or political opinion, fled from the Union of Soviet Socialist Republics or other Communist, Communist-dominated or Communist-occupied area of Europe including those parts of Germany under military occupation by the Union of Soviet Socialist Republics, and who cannot return thereto because of fear of persecution on account of race, religion or political opinion.

(c) "German expellee" means any refugee of German ethnic origin residing in the area of the German Federal Republic, western sector of Berlin, or in Austria who was born in and was forcibly removed from or forced to flee from Albania, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Rumania, Union of Soviet Socialist Republics, Yugo-

slavia, or areas provisionally under the administration or control or domination of any such countries, except the Soviet zone of military occupation of Germany.

* * * * *

3. Section 15, Act of September 11, 1957, 71 Stat. 643, in pertinent part.

SEC. 15. (a) Notwithstanding the provisions of section 20 of the Refugee Relief Act of 1953, as amended (67 Stat. 400; 68 Stat. 1044), special nonquota immigrant visas authorized to be issued under section 3 of that Act which remained unissued on January 1, 1957, shall be allotted, and may be issued by consular officers as defined in the Immigration and Nationality Act, in the following manner:

(1) Not to exceed two thousand five hundred visas to aliens described in paragraph (1) of section 4(a) of the Refugee Relief Act, as amended;

(2) Not to exceed one thousand six hundred visas to aliens described in paragraphs (9) or (10) of such section 4(a);

(3) All the rest and remainder of said visas to aliens who are refugee-escapees as defined in subsection (c).

* * * * *

(c)(1) For purposes of subsection (a), the term "refugee-escapee" means any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion.

4. *Section 1, Fair Share Act of July 14, 1960, 74 Stat. 504.*

That under the terms of section 212(d)(5) of the Immigration and Nationality Act the Attorney General may parole into the United States, pursuant to such regulations as he may prescribe, an alien refugee-escapee defined in section 15(c)(1) of the Act of September 11, 1957 (71 Stat. 643) if such alien (1) applies for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist-occupied, (2) is not a national of the area in which the application is made, and (3) is within the mandate of the United Nations High Commissioner for Refugees.

U.S. GOVERNMENT PRINTING OFFICE: 1971

SUPREME COURT OF THE UNITED STATES

No. 156.—October Term, 1970

George K. Rosenberg, District Director, Immigration and Naturalization Service, Petitioner, *v.* Yee Chien Woo.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 21, 1971]

Mr. Justice Black delivered the opinibn of the Court.

Respondent, Yee Chien Woo, is a native of Mainland China, a Communist country, who fled that country in 1953 and sought refuge in Hong Kong. He lived in Hong Kong until 1959 when he came to the United States as a visitor to sell merchandise through a concession at a trade fair in Portland, Oregon. After a short stay, he returned to Hong Kong only to come back to the United States in 1960 to participate in the San Diego Fair and International Trade Mart to promote his Hong Kong business. Thereafter he remained in the United States although he continued to maintain his clothing business in Hong Kong until 1965. In 1965 respondent's wife and son obtained temporary visitor's permits and joined him in this country. By 1966 all three had overstayed their permits and were no longer authorized to remain in this country. After the Immigration and Naturalization Service began deportation proceedings, Yee Chien Woo applied for an immigrant visa claiming a "preference" as an alien who had fled a Communist country fearing persecution as defined in § 203 (a)(7) of the Immigration and Nationality Act of 1952, as amended, 8 U. S. C. § 1153 (a)(7) (Supp. V, 1965).

The District Director of the Immigration and Naturalization Service denied respondent's application because "the applicant's presence in the United States . . . was not and is not now a physical presence which was *a consequence of his flight in search of refuge* from the Chinese mainland." (Emphasis added.) On appeal within the Immigration and Naturalization Service, the decision of the District Director was affirmed by the Regional Commissioner on the grounds that "Congress did not intend that an alien, though formerly a refugee, who had established roots or acquired residence in a country other than the one from which he fled would again be considered a refugee for the purpose of gaining entry into and or subsequently acquiring status as a resident in this, the third country."

Respondent then sought review in the United States District Court for the Southern District of California which reversed the District Director's determination. That court, without ever deciding whether resettlement would have barred respondent's claim, found as a matter of fact that he had never firmly resettled in Hong Kong.[1] The Immigration and Naturalization Service appealed to the United States Court of Appeals for the Ninth Circuit. That court affirmed the District Court because in its view whether Yee Chien Woo was "firmly resettled" in Hong Kong was "irrelevant" to consideration of his application for an immigration quota. It stated:

> "Whether appellee was firmly resettled in Hong Kong is not, then, relevant. What is relevant is

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[1] "Without expressing any opinon as to why Congress chose to omit the 'firmly resettled' provision in the amendments to the Refugee Relief Act of 1953, this court finds that plaintiff was never 'firmly resettled' and still qualifies as a refugee under the terms of section 203 (a)(7). Accordingly, the District Director erred in denying plaintiff's application." 295 F. Supp. 1370, 1372 (1968).

that he is not a national of Hong Kong (or the United Kingdom); that he is a national of no country but Communist China and as a refugee from that country remains stateless." 419 F. 2d 252, 254 (1969).

The Court of Appeals for the Second Circuit in a case decided after the Ninth Circuit decision below faced the issue of the relevancy of resettlement and expressly declined to follow the Ninth Circuit interpretation of the statute.[2] *Shen* v. *Esperdy*, 428 F. 2d 293 (1970). We granted certiorari in this case to resolve the conflict. 400 U. S. 864 (1970).

Since 1947 the United States has had a congressionally enacted Immigration and Naturalization policy which granted immigration preferences to "displaced persons," "refugees," or persons who fled certain areas of the world because of "persecution or fear of persecution on account of race, religion, or political opinion." Although the language through which Congress has implemented this policy since 1947 has changed slightly from time to time, the basic policy has remained constant—to provide a haven for homeless refugees and to fulfill American responsibilities in connection with the International Refugee Organization of the United Nations. This policy is currently embodied in the "Seventh Preference" of § 203 (a) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1153 (a) (Supp. V, 1965), which provides in pertinent part:

"(a) Aliens who are subject to the numerical limitations specified in section 201 (a) shall be allotted

[2] The Second Circuit dealt at length with the Ninth Circuit's opinion in this case, concluding:

"In so far as Yee Chien Woo v. Rosenberg holds that the concept of firm resettlement is irrelevant to applications made under section 203 (a)(7) of the Act, we must disagree with the Ninth Circuit." 428 F. 2d 293, 298 (1970).

visas or their conditional entry authorized, as the case may be, as follows:

. . . . . .

"(7) [A]liens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, . . . and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; . . . ."

The Ninth Circuit supported its conclusion that the "firmly resettled" concept was irrelevant under § 203 (a) (7) upon two bases. First, the court noted that the "firmly resettled" langauge was first introduced in Displaced Persons Act of 1948, 62 Stat. 1009, and was then expressly stated in the Refugee Relief Act of 1953, 67 Stat. 400, both of which are predecessors of the present legislation.[3] However, when the Refugee Relief Act of 1953 was extended in 1957, the "firmly resettled" lan-

[3] The Displaced Persons Act of 1948 defined a "displaced person" by reference to the Constitution of the International Refugee Organization (IRO) and to persons who were of concern to that organization. Persons ceased to be of concern to the IRO when they acquired a new nationality or by their firm establishment. S. Rep. 950, 80th Cong., 2d Sess., at 68.

The Refugee Relief Act of 1953 provided: " 'Refugee' means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation." Refugee Relief Act of 1953, § 2 (a), 67 Stat. 400.

guage was dropped in favor of a formula defining an eligible refugee as "any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee" from certain areas. The 1957 Act was then followed by the Fair Share Law of 1960, Pub. L. 86–648, 74 Stat. 504, which defined "refugee" as one "not a national of the area in which application is made, and (3) [who] is within the mandate of the United Nations High Commissioner for Refugees." Finally, the present legislation was added to the Immigration and Nationality Act in 1965. From the 1957 abandonment of the words "firmly resettled" the Court of Appeals determined that Congress had purposefully rejected "resettlement" as a test for eligibility for refugee status.

Second, the Ninth Circuit gave particular significance to the statutory requirement that refugees "are not nationals of the countries or areas in which their application for conditional entry is made." Thus, in the court's view, Congress intended to substitute the "not nationals" requirement for the "not firmly resettled" requirement. For substantially the reasons stated by the Second Circuit in *Shen* v. *Esperdy*, 428 F. 2d 293 (1970), we find no congressional intent to depart from the established concept of "firm resettlement" and we do not give the "not nationals" requirement of § 203 (a)(7)(iii) as broad a construction as did the court below.

While Congress did not carry the words "firmly resettled" over into the 1957, 1960, and 1965 Acts from the earlier legislation, Congress did introduce a new requirement into the 1957 Act—the requirement of "flight." The 1957 Act, as well as the present law, speaks of persons who have *"fled"* to avoid persecution.[4] Both the terms

[4] The 1957 amendments to the Refugee Relief Act of 1953 did not mark any great change in American refugee policy. Congress was primarily concerned with distributing 18,656 visas that were originally

"firmly resettled" and "fled" are closely related to the central theme of all 23 years of refugee legislation—the creation of a haven for the world's homeless people. This theme is clearly underlined by the very titles of the Acts over the years from the Displaced Persons Act in 1948 through the Refugee Relief Act and the Fair Share Act of 1960. Respondent's reliance on the Fair Share Act of 1960 to show that Congress abandoned the "firmly resettled" concept is particularly misplaced because Congress envisioned that legislation not only as the means through which this country would fulfill its obligations to refugees, but as an incentive to other nations to do likewise.[8] Far from encouraging resettled refugees to leave one secure haven for another, the Act estab-

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authorized under the 1953 Act but remained unissued when that Act expired on January 1, 1957. The Senate report on the bill states the congressional intent: "It is the intention of the committee that the distribution of this remainder will be made in a fair and equitable manner, without any prescribed numerical limitations for any particular group, according to the showing of hardship, persecution, and the welfare of the United States." S. Rep. No. 1057, 85th Cong., 1st Sess., at 6. Indeed, after the 1957 Act became law the Immigration and Naturalization Service promulgated and uniformly administered regulations which specifically referred to the resettlement requirement.

"§ 44.1 *Definitions.*

. . . . . .

"(f) 'Refugee' means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled and who is in urgent need of assistance for the essentials of life or for transportation." 22 CFR § 44.1 (1958), 22 Fed. Reg. 10826 (Dec. 27, 1957).

[8] Careful study of the Fair Share Act demonstrates that resettlement was relevant even under that legislation. In order to qualify as a refugee under the Fair Share Act, the alien had to be "within the mandate of the United Nations Commissioner for Refugees." Specifically excluded from the Commissioner's competence was a person who "is recognized by competent authorities of the country

lished United States quotas as a percentage—25%—of the refugees absorbed by all other cooperating nations. The Fair Share Act, like its successor and predecessors, was enacted to help alleviate the suffering of homeless persons and the political instability associated with their plight. It was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives. Nor could Congress have intended to make refugees in flight from persecution compete with all of the world's resettled refugees for the 10,200 entries and permits afforded each year under § 203 (a)(7). Such an interpretation would subvert the lofty goals embodied in the whole pattern of our refugee legislation.

In short, we hold that the "resettlement" concept is not irrelevant. It is one of the factors which the Immigration and Naturalization Service must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution. The District Director applied the correct legal standard when he determined that § 203 (a)(7) requires that "physical presence in the United States [be] a consequence of an alien's flight in search of refuge," and further that "the physical presence must be one which is reasonably proximate to the flight and not one following a flight remote in point of time or intervening resi-

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in which he has taken residence as having the rights and obligations which are attached to possession of the nationality of that country. . . ." Statute of the Office of the United Nations High Commissioner for Refugees, Chapter II, para. 7 (b), contained in Resolution 428 (V) of the United Nations General Assembly passed December 14, 1950. It appears that under this statute, Yee Chien Woo probably would not have fallen within the Commissioner's mandate because although he was not a Hong Kong (or British) national, he possessed valid Hong Kong identity papers enabling him to return and live there.

dence in a third country reasonably constituting a termination of the original flight in search of refuge."[6]

Finally, we hold that the requirement of § 203 (a)(7)(iii) that refugees not be "nationals of the countries or areas in which their application for conditional entry is made" is not a substitute for the "resettlement" concept. In the first place that section is not even applicable to respondent. He was applying for an immigrant visa, not a conditional entry permit to which part iii of subsection 7 is expressly limited. He had already been granted entry to the United States as a business visitor. Second, even if the provision were applicable, the country "in which" respondent's application was made was the United States and he was certainly not a national of this country. Had he been a national he of course would have been entitled to remain here. Section 203 (a)(7)(iii) applies only to applications for conditional entry into this country made to Immigration and Naturalization officers author-

[6] The legal standard employed by the District Director and approved here today does not exclude from refugee status those who have fled from persecution and who make their flight in successive stages. Certainly many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. Such stops do not necessarily mean that the refugee's aim to reach these shores has in any sense been abandoned. However, there are many refugees who have firmly resettled in other countries and who either never aimed to reach these shores or have long since abandoned that aim. In the words of the District Director, the presence of such persons in this country is not "one which is reasonably proximate to the flight" or is "remote in point of time or intervening residence in a third country." Such persons are not entitled to refugee status under § 203 (a)(7).

In this very case, the District Court found that Yee Chien Woo was not firmly resettled even though he had lived in Hong Kong for six years after his initial flight. We do not express an opinion on that finding but merely remand the case to the Court of Appeals for review in accord with the proper legal standard.

ized to accept such applications at points outside the United States.

Because it was under the erroneous impression that resettlement was irrelevant to refugee status under § 203 (a)(7), the Court of Appeals failed to review the District Court's finding that respondent had never firmly resettled in Hong Kong. The District Director is, of course, entitled to review of that determination under the legal test set out in this opinion and the appropriate standards for judicial review. Consequently, the judgment below is reversed and the case is remanded to the Ninth Circuit for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 156.—October Term, 1970

George K. Rosenberg, District Director, Immigration and Naturalization Service, Petitioner,
v.
Yee Chien Woo.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 21, 1971]

Mr. Justice Stewart, with whom Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall join, dissenting.

On March 8, 1966, the respondent, who fled mainland China for Hong Kong in 1953 and has resided in the United States since May 22, 1960, filed with the Immigration Service an application for adjustment of status pursuant to § 203 (a)(7) of the Immigration and Nationality Act, as amended, 8 U. S. C. § 1153 (a)(7). By the terms of § 203 (a)(7) applicants for adjustment of status are required to show:

1. that they "have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status;"

2. that "because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area . . . ;"

3. that they "are unable or unwilling to return to such country or area on account of race, religion, or political opinion;"

4. that they "are not nationals of the countries or areas in which their application for conditional entry is made . . . ."

The District Director denied the respondent's application for adjustment of status because of "intervening residence in a third country reasonably constituting a terminating of the original flight in search of refuge." An administrative appeal was certified to the Regional Commissioner who held that § 203 (a)(7) does not apply "to aliens who although they have fled from their own country were later resettled in another country."

Section 203 (a)(7) contains no requirement that an applicant has not "resettled" prior to his application for conditional entry or adjustment of status. A requirement that an applicant had not "firmly resettled" did appear in an earlier version of the law but was eliminated by the Refugee Relief Act of 1957. The requirement was not reintroduced in any of the subsequent enactments. To the contrary, cognizant House and Senate Committees rejected a proposal of the Department of State which contained a requirement that a refugee alien must be one who "has not been firmly resettled . . . ." S. Rep. No. 1651, 86th Cong., 2d Sess., 19; H. R. Rep. No. 1433, 86th Cong., 2d Sess., 12. Senator Kennedy, who, as Chairman of the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, presided over Senate hearings on the present § 203 (a)(7), stated that refugees "as defined in this bill" "must be currently settled in countries other than their homelands." 111 Cong. Rec. 24227. This statement is flatly inconsistent with the proposition that the persons described in § 203 (a)(7) cannot have resettled in another country following their original flight.

In the face of the unambiguous language of § 203 (a)(7) and this clear legislative history, the Court today holds that a requirement of firm resettlement may properly be read back into the statute so as not to subvert what it considers to be the "central theme" of refuge legislation—"the creation of a haven for the world's

homeless people." I have no doubt that in enacting refugee legislation Congress intended to provide a haven for the homeless. But the Court offers no reason to believe that Congress did not also intend to help those others who have fled their homeland because of oppression, have found a temporary refuge elsewhere, and now desire to emmigrate to the United States. Congress may well have concluded that such people should be preferred to immigrants who have not suffered such hardship. The clear language of § 203 (a)(7) demonstrates to me that this was exactly what Congress intended to accomplish.

Whether the Attorney General has discretion concerning the order in which § 203 (a)(7) applications are processed is a different issue and one that is not before us. The Attorney General has not sought to invoke whatever discretion he may have to process the applications of the homeless before turning to those whose plight may be thought less pressing.[1] Indeed it appears that in many years a number of the visas annually available for § 203 (a)(7) applicants have gone unused.[2]

The only issue before the Court is whether a refugee is totally barred from any consideration under § 203 (a)(7) by virtue of resettlement following flight. In view of the language of the statute and its legislative history, I cannot but conclude that under § 203 (a)(7) the respondent was eligible for the adjustment of status that he sought.

For these reasons I dissent.

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[1] Section 203 (c), 8 U. S. C. § 1153 (c), which provides that visas shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General, does not by its terms apply to visas issued pursuant to § 203 (a)(7). And Senator Kennedy stated that under § 203 (a)(7) "[t]he cases of greatest need can be processed at once." 111 Cong. Rec. 24227.

[2] 1969 Annual Report, Immigration and Naturalization Service 38.